

ORIGINAL

SUPERIOR COURT  
YAVAPAI COUNTY, ARIZONA

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

JEANNE HICKS, CLERK  
S. KELBAUGH  
BY: \_\_\_\_\_

THE STATE OF ARIZONA, )

Plaintiff, )

vs. )

STEVEN CARROLL DEMOCKER, )

Defendant. )

P1300

No. CR 2008-1339

BEFORE: THE HONORABLE THOMAS B. LINDBERG  
JUDGE OF THE SUPERIOR COURT  
DIVISION SIX  
YAVAPAI COUNTY, ARIZONA

PRESCOTT, ARIZONA  
TUESDAY, APRIL 7, 2010  
9:02 A.M.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

PRETRIAL MOTIONS

ROXANNE E. TARN, CR  
Certified Court Reporter  
Certificate No. 50808

APRIL 7, 2010  
9:02 A.M.

PRETRIAL MOTIONS

APPEARANCES:

FOR THE STATE: MR. JOE BUTNER AND MR. JEFF  
PAPOURE.

FOR THE DEFENDANT: MR. JOHN SEARS, MR. LARRY  
HAMMOND AND MS. ANNE CHAPMAN.

THE COURT: This is State versus Steven  
Carroll DeMocker in CR 2008-1339. Defendant is present with  
his counsel, and prosecution is represented by Mr. Paupore  
and Mr. Butner.

The first issue that I had that I think  
we ought to take up is with young Mr. Knapp and his mother.  
My understanding is that the mother is here, so if we could  
call her first and deal with that.

Do you want to make any preliminary  
remarks on either side?

MR. BUTNER: Judge, all I would say is that we  
filed a motion asking that this child be allowed to testify  
by virtue of a closed-circuit television sort of hook-up but  
still in such a fashion to honor the defendant's  
confrontation rights under the Constitution. He is not a  
major witness, and I think the documentation presented to the  
Court establishes that this would be a very traumatic  
experience for him and might result in his, so to speak,

1 unavailability in the event that he were to clam up, which is  
2 a distinct possibility. So I would ask that the Court honor  
3 the request of his mother and the State to allow him to  
4 testify in this fashion. I think that she will come in and  
5 plead further.

6 THE COURT: All right. Thank you.

7 THE CLERK: You do solemnly swear or affirm  
8 under the penalty of perjury that the testimony you are about  
9 to give will be the truth, the whole truth, and nothing but  
10 the truth, so help you God?

11 THE WITNESS: Yes.

12 THE COURT: Good morning. You are  
13 Mrs. Saxerud?

14 THE WITNESS: Yes.

15 ANNA MARGARET SAXERUD,  
16 called as a witness, having been duly sworn, testified as  
17 follows:

18 DIRECT EXAMINATION

19 BY MR. BUTNER:

20 Q. Miss Saxerud, the judge wants me to do this by way  
21 of an examination. It will be very easy for you, I think.

22 Would you please tell the Court your full  
23 name.

24 A. Anna Margaret Saxerud.

25 Q. What is your occupation, by the way?

1 A. I am a registered nurse.

2 Q. You are the mother of Alexander James Knapp?

3 A. Yes.

4 Q. How old is Alexander?

5 A. 12.

6 Q. He is your son?

7 A. Yes.

8 Q. Does he continue to reside with you?

9 A. Yes.

10 Q. You wrote a letter to the judge, and you also  
11 consulted with a therapist of some sort, concerning  
12 Alexander; is that correct?

13 A. Yes.

14 Q. Would you tell us who that therapist was?

15 A. Tony Himes.

16 Q. And are you --

17 THE COURT: Could you spell "Himes."

18 THE WITNESS: H-i-m-e-s.

19 MR. HAMMOND: Could she pull the microphone a  
20 little closer or speak a little louder.

21 BY MR. BUTNER:

22 Q. Are you aware of Mr. Himes' qualification as a  
23 therapist?

24 A. Yes, I have the letter, and they are stated under  
25 his signature.

1 Q. What are his qualifications?

2 A. Licensed marriage and family therapist.

3 Q. And how is it that you had Alexander going to Tony  
4 Himes?

5 A. For some support during my former husband Jim  
6 Knapp's divorce and mine and since then. I think it is  
7 important for him to have a person that he can talk to that  
8 is outside of our family.

9 Q. How long has Alexander been consulting with and  
10 treating with, so to speak, Tony Himes?

11 A. I believe about a year-and-a-half to two years.

12 Q. And approximately how many times has he visited  
13 with Mr. Himes?

14 A. I would say maybe eight to ten.

15 Q. And did you consult with Mr. Himes concerning  
16 Alexander testifying in these proceedings?

17 A. Yes.

18 Q. Well, you filed the letter with the Court; right?

19 A. Yes.

20 Q. Basically, would you tell us what Mr. Himes told  
21 you?

22 A. Could I just read it?

23 Q. Sure.

24 A. "Judge Lindberg, I am writing regarding Alex James  
25 Knapp. This young man has been seen by me on several

1 occasions."

2 Q. It's okay. Take a break anytime you need to.

3 A. "And my impressions of Alex are that he is at a  
4 fragile juncture in his emotional development. Currently, he  
5 is still grieving the loss of his father and attempting to  
6 manage various stressors involved with court proceedings. He  
7 has become a patient. I believe it would be beneficial if he  
8 provided whatever information is sought in a closed chambers  
9 setting. I hope that you will consider what is left of this  
10 youngster's innocence in your decision-making process. I  
11 appreciate your attention and time concerning this matter.  
12 Respectfully, Tony Himes." Excuse me.

13 Q. And, of course, you are Alexander's mother, so you  
14 are around him a lot; right?

15 A. Yes.

16 Q. He continues to reside with you; is that correct?

17 A. Yes.

18 Q. And have you talked with him about this?

19 A. Yes.

20 Q. And what are your views as his mother -- and I  
21 guess also as a registered nurse -- concerning the effect  
22 that in-court testimony in a live setting confronting the  
23 defendant -- what do you believe the effect would be on  
24 Alexander?

25 A. Alex has asked me specifically if he would have to

1 testify. He prefers not to. He is scared of Mr. DeMocker  
2 and has on several occasions said "what if Steve gets off and  
3 comes after me." So from a child's -- that is from a child's  
4 point of view, regardless of how we adults feel about that.  
5 And it is intimidating for him to be in this setting. And  
6 when I was reading about preparing children for court, it is  
7 particularly stressful for children, at least in the  
8 documentation that I have read.

9 Q. Did you consult some professional literature in  
10 this regard?

11 A. Yes.

12 Q. And what literature did you consult? Do you have  
13 that at hand?

14 A. Yes.

15 Q. What is it?

16 A. It is from the American Prosecutor's Research  
17 Institute, and it is titled "Preparing Children For Court."

18 And also from Commonwealth Attorney  
19 Victim Witness Assistance Program, "Prepare Your Child to  
20 Testify."

21 Q. And?

22 A. And I have talked to people from Child Protective  
23 Services and the consensus is that it is hard for kids, and  
24 Alex is particularly fearful.

25 Q. So what is your opinion in regard to the effect

1 that would have on your son Alex?

2 A. I believe it would be detrimental to his emotional  
3 health.

4 Q. Do you think he would be able to do it?

5 A. I don't know.

6 Q. Are you concerned that he might not be able to?

7 A. Yes, and I think -- for children, I think it is  
8 important to be considerate and treat them as kids.

9 Q. And so what is your opinion in regard to how Alex  
10 should be allowed to testify?

11 A. I would like him to be -- I requested from Judge  
12 Lindberg that he be -- that his testimony be taken by  
13 alternative method -- specifically, closed-circuit T.V. in  
14 chambers. And I read that is something that is done for  
15 children that don't -- or that are fearful of being in the  
16 courtroom with somebody they are scared of.

17 Q. Would you like to be there with him?

18 A. I would, yes.

19 MR. BUTNER: I don't have any further  
20 questions of this witness at this time, Judge. Thank you.

21 THE COURT: Cross.

22 CROSS-EXAMINATION

23 BY MR. SEARS:

24 Q. Miss Saxerud, my name is John Sears. I am one of  
25 the lawyers that represents Steve DeMocker in this case. Let

1 me say something to you, if I could, at the beginning. There  
2 have been suggestions in this case, some in the press and  
3 elsewhere.

4 A. Somewhere.

5 Q. There are some suggestions that the defense in  
6 this case is accusing Jim Knapp of murdering Carol Kennedy.  
7 And I just want to tell you that what we are doing now is  
8 investigating his involvement, if he had any in this case,  
9 and we have not said anywhere that we believe that Jim  
10 murdered Carol. I want you to understand that. His  
11 involvement in this case is a continuing mystery to us.  
12 There are parts of his involvement about which --

13 MR. BUTNER: Objection, Judge. This is a nice  
14 little speech that Mr. Sears is making, but I don't think it  
15 is appropriate at this time. It is certainly not questioning  
16 or cross-examination.

17 THE COURT: A simple objection would suffice,  
18 Mr. Butner, yourself.

19 Sustained.

20 MR. SEARS: I will ask a question, Your Honor.

21 Q. You and Alex were interviewed by the police in  
22 2008. Do you remember that?

23 A. Alex was interviewed, yes.

24 Q. Do you remember being interviewed yourself?

25 A. I was with him.

1 Q. Do you remember speaking to a police officer?

2 A. At the County Attorney's Office? Is that the one?

3 Q. Detective Brown.

4 A. Yes.

5 Q. Do you remember that interview was tape-recorded?

6 A. Yes.

7 Q. You have not been interviewed by anyone  
8 representing Mr. DeMocker in this case, have you?

9 A. I was contacted by a private investigator.

10 Q. Mr. Robertson?

11 A. I didn't see him. I just spoke to him on the  
12 phone.

13 Q. And at some point in that discussion you told him  
14 that you didn't really want to speak with him anymore?

15 A. Yes.

16 Q. And you didn't want him or anyone from the defense  
17 to speak to either of your sons; is that right?

18 A. He didn't ask me that question.

19 Q. Let me put it to you this way: Would you be  
20 willing to allow, under appropriate circumstances, someone  
21 from the defense to speak with you and to speak with Alex?

22 A. No.

23 Q. Could you tell me why?

24 A. I am willing to talk to law enforcement and that's  
25 it. And we have been subpoenaed, so I am under the

1 impression that we -- that there is no choice in that.

2 Q. In the letters that were sent to Judge Lindberg, a  
3 suggestion is made that Alex has some fear of Mr. DeMocker;  
4 is that right?

5 A. Yes.

6 Q. Do you know if Alex has ever met Mr. DeMocker?

7 A. He saw him at Carol's funeral, and I don't know if  
8 they met or not. I doubt it.

9 Q. Do you know the specifics of that circumstance  
10 that would cause him to be afraid of Mr. DeMocker?

11 A. He believes that Mr. DeMocker killed Carol.

12 Q. That is what he told you?

13 A. Yes.

14 Q. Have you discussed the possibility of consenting  
15 to an interview on your own and on behalf of your son with  
16 anyone from the County Attorney's Office? And when I say an  
17 interview, I mean a defense interview in this case.

18 A. I am not sure I understand that.

19 Q. You told me here today that you won't voluntarily  
20 agree to be interviewed by the defense; correct?

21 A. Right.

22 Q. And you won't agree voluntarily to allow your son  
23 Alex to be interviewed by the defense?

24 A. Right.

25 Q. Have you discussed that subject, the subject of

1 defense interviews with you and your son, with anyone on the  
2 prosecution side?

3 A. No.

4 MR. SEARS: I don't have any other questions,  
5 Your Honor.

6 THE COURT: Mr. Butner.

7 MR. BUTNER: Nothing further. Thank you,  
8 Judge.

9 Thank you, Miss Saxerud.

10 THE COURT: You may step down. Thank you.

11 Any other witnesses on this topic?

12 MR. BUTNER: None, Your Honor.

13 THE COURT: From defense side?

14 Any objection to Miss Saxerud being  
15 allowed to leave or remain in the courtroom?

16 MR. SEARS: No. I have no objection.

17 THE COURT: Mr. Butner.

18 MR. BUTNER: Judge, I think that under the  
19 facts and circumstances concerning this particular witness  
20 that it would be appropriate for the Court to order that he  
21 be allowed to testify in accordance with the request of his  
22 mother in a closed-circuit setting.

23 THE COURT: Do you have any objection to  
24 Miss Saxerud remaining in?

25 MR. BUTNER: Of course not.

1 THE COURT: You are excused, but you may  
2 remain in the courtroom. So you can leave or stay, as you  
3 choose.

4 Go ahead, Mr. Butner.

5 MR. BUTNER: Judge, I think under the facts  
6 and circumstances it would be appropriate that the Court  
7 allow Alexander James Knapp to testify by way of  
8 closed-circuit television from the Court's chambers, but of  
9 course assuring that the defendant had the right to confront  
10 and cross-examine him through counsel. That has been done in  
11 a number of cases that I have handled; albeit, those were, of  
12 course, victim children that testified in that fashion. But  
13 I think that under the circumstances of this case and given  
14 Alexander's role in this case, I think it would be  
15 appropriate that he be allowed to testify in that fashion.

16 Thank you.

17 THE COURT: Mr. Sears.

18 MR. SEARS: Your Honor, we were planning to  
19 suggest, until this morning, that before you make a decision  
20 about how and under what circumstances alternative means  
21 would be provided for this young man to testify, that we be  
22 allowed to conduct a dignified and reasonable defense  
23 interview of this child and of his mother in this case. And  
24 just to remind you, Your Honor, we have talked a number of  
25 times about the relationship of Ms. Saxerud and her children

1 to what the State considers to be an alibi on the part of  
2 Mr. Knapp on the night in question, that he was with them.  
3 And the time frame and some of the details of that are still  
4 a matter of continuing investigation to us. And it would be  
5 very important to us to speak with Ms. Saxerud and with her  
6 son about those matters primarily, but also some matters  
7 related to Mr. Knapp.

8 And the idea that my client's fundamental  
9 constitutional rights would be affected, when we really don't  
10 know precisely, beyond what Miss Saxerud said in these  
11 letters and said again here this morning, forms the basis for  
12 him needing and wanting to be able to testify in an unusual  
13 and alternative way, gives us pause. And we are not saying  
14 at this point that after these interviews we would oppose  
15 those arrangements. We just think it would be appropriate  
16 for us to understand more fully what happened.

17 Unfortunately, under the circumstances,  
18 unless the State can take the opportunity to try to persuade  
19 Miss Saxerud to a different point of view, we ask you to  
20 enter an order setting depositions of both the child and  
21 Miss Saxerud in this case. I can assure Miss Saxerud and the  
22 prosecution team we would make every reasonable effort to be  
23 respectful of everyone's interest in this case and within  
24 reason to arrange for an interview that would be as  
25 non-threatening and non-confrontational as possible.

1                   This is information we need to have, and  
2 it is as clear as it can be that we are not going to get the  
3 information from the State and voluntarily from these  
4 witnesses. So I think under the rule we are entitled to the  
5 Court setting a deposition. Again, in the face of that  
6 order, we would be happy to do that. We have explained a  
7 number of times now why this information is necessary to our  
8 investigation in this case.

9                   THE COURT: Mr. Butner.

10                  MR. BUTNER: If I could have a moment to  
11 confirm with Miss Saxerud.

12                  THE COURT: We will take is a brief recess and  
13 go off the record.

14                               (Brief recess.)

15                  THE COURT: The record can reflect that  
16 Mr. Butner and Mr. Paupore have returned to the room and  
17 Miss Saxerud is still in the room.

18                  MR. BUTNER: Thanks for your patience, Judge,  
19 and opposing counsel.

20                               I spoke with Miss Saxerud, and basically,  
21 her primary concern, of course, is her son Alex. And she is  
22 concerned about him having to go through this experience on  
23 multiple occasions. And so her preference is that Alex be  
24 simply allowed to testify one time, so to speak,  
25 closed-circuit, in chambers, in the Judge's chambers, so that

1 the defendant will have his right of confrontation honored.

2 She does not wish to submit to a defense  
3 interview, and she does not wish to voluntarily submit to a  
4 deposition either. And that is on behalf of herself and her  
5 son. She is greatly concerned about the effect on her son.

6 THE COURT: You have asked her, in your  
7 motion, for testimony pursuant to 13-4253(A), as  
8 distinguished from 13-4253(B). (B), in essence, allows for,  
9 essentially, the possibility of testimony outside the  
10 courtroom, but recorded for showing in the courtroom before  
11 the Court has distinguished from doing some kind of closed  
12 circuit.

13 MR. BUTNER: Judge, we would be happy, in the  
14 alternative, to proceed under (B), and do that by way of, if  
15 necessary, a deposition, so to speak -- a Court-ordered, you  
16 know, video deposition.

17 THE COURT: Generally speaking, you recognize  
18 that the defense has a right to an interview of any witness  
19 that the State is going to be calling, and if somebody --

20 MR. BUTNER: Generally speaking, I do.

21 THE COURT: -- if somebody won't consent to  
22 interview, generally speaking, they are subject to being  
23 deposed.

24 MR. BUTNER: Yes, Your Honor. I understand  
25 that, generally speaking.

1 THE COURT: I presume that that was conveyed  
2 to Miss Saxerud, also?

3 MR. BUTNER: Yes, Your Honor, it was.

4 THE COURT: Okay. Mr. Sears, any thoughts on  
5 use of subsection (B) rather than (A) or other possible  
6 considerations in the case?

7 MR. SEARS: Judge, we have been looking at an  
8 older Arizona case, *State versus Vincent*, 159 Arizona 418, a  
9 Pima County matter. And in this case, there are some  
10 similarities in that case where -- except that it was the  
11 defendant's children that were being offered through  
12 videotaped testimony -- and that conviction was reversed  
13 because the Court, despite those letters -- which sound  
14 somewhat similar to the letters that have been presented to  
15 you here -- didn't make a particularized showing of the  
16 traumatic effect of in-court testimony on each of the  
17 children.

18 And what we have proposed, and I would  
19 propose again, because I think it makes some sense, is that  
20 before anyone asks you, again, to order or consider ordering  
21 alternative methods of testimony either under (A) or (B),  
22 either live, via closed circuit or a videotaped deposition,  
23 that at a minimum we be allowed to interview the mother and  
24 child to get more information about the particularized harm,  
25 so that we would be in a position to speak to that question

1 beyond the little bit that's been presented here. I do that  
2 rather than simply object and say they haven't made a  
3 sufficient showing, because there may be, Your Honor -- there  
4 may be good reason to do this that doesn't come to us now,  
5 but after we see this child, get a sense of who he is and how  
6 he really is affected by this, what he has been told, why he  
7 thinks what he thinks about our client, we may have a  
8 different view. But right now, we are here to protect  
9 Mr. DeMocker's Sixth Amendment rights, and we don't think the  
10 State has made a showing.

11                   What we are offering, as distasteful as  
12 it may be to Miss Saxerud, is really a better and more  
13 reasonable way to get at what it is that we think the Court  
14 needs to know before making this decision in a capital case.  
15 As between (A) and (B), I think you can see that there are  
16 problems either way with that, but those problems are really  
17 secondary to the fact that we don't want to be conducting our  
18 defense interview while the child is testifying, either  
19 during a deposition that would be played to the jury or,  
20 worst of all, while the child is testifying versus closed  
21 circuit with the jury on the other end of that link-up.

22                   So I would propose that no ruling be made  
23 yet, that the matter be taken under advisement. And if she  
24 won't -- sounds like, again, she won't consent to an  
25 interview -- that the Court order a deposition. I would

1 remind the State that Rule 15.3 presumes that Mr. DeMocker  
2 would be present at that deposition, and I would again offer  
3 to do it via informal interview, if that would be a  
4 particular problem. If that doesn't solve it, then that is  
5 certainly a right of our client that we would likely not  
6 waive under Rule 15.3. But I would ask that you would do  
7 that, and we would work with Miss Saxerud and the State to  
8 find a quick time and place to do this.

9 THE COURT: All right. I will take the motion  
10 for out-of-court testimony, pursuant to 13-4253, under  
11 advisement, that motion having been filed April 1st by the  
12 prosecution. At this point, I will not order a deposition.  
13 I will allow the parties to see if there may be some method  
14 of interviewing.

15 It seems to me, just as an aside, having  
16 had some experience in dealing with children, as a defense  
17 attorney, as a prosecutor, and as a judge, that to leave Alex  
18 not having met Mr. Sears, Mr. Hammond -- may not have even  
19 met Mr. DeMocker -- that seems unclear, based on the  
20 testimony at this point -- that it actually increases the  
21 potential trauma to him, if trauma there be, by delaying all  
22 of that to some later trial date. So I recognize, under the  
23 Rules of Procedure, the defense is entitled to an interview.  
24 If the witnesses for the State will not consent to an  
25 interview, they may be entitled to a deposition. That is a

1 matter of procedural law, and I don't dispute the other  
2 statements that Mr. Sears made or what Mr. Butner made in  
3 connection with this question.

4 I may need some additional testimony as  
5 relates to the case. I recognize *State vs. Vincent*. I've  
6 read that case previously.

7 So I'll take the matter under advisement.  
8 See what you can work together on. And failing to have an  
9 interview, you may apply to the Court for a deposition.

10 MR. SEARS: Your Honor, it would seem to me  
11 that we have reached that bridge and not gotten across it  
12 here today. If I was hearing Miss Saxerud and Mr. Butner  
13 correctly, they have posed that very question to her again  
14 today and did it again in private, and her position has not  
15 changed. I think that is where we are, and I am not sure  
16 what more could be done to change that position.

17 THE COURT: Well, I am prepared to order a  
18 deposition, if that is what you are seeking.

19 MR. SEARS: I am. I am. And what I'm  
20 saying -- and maybe I didn't make myself clear. What I am  
21 suggesting is that I will still offer, up to a reasonable  
22 time before the actual deposition, an interview in lieu of  
23 deposition. But in view of the crush of time, we need to  
24 have that deposition in hand to keep this moving forward.

25 THE COURT: I will authorize you to have a

1 deposition of both Ms. Saxerud and young Mr. Knapp --  
2 Alexander Knapp.

3 MR. SEARS: Thank you, Your Honor.

4 MR. BUTNER: Judge, I understand the Court's  
5 order. And in regard to that order, particularly in regard  
6 to young Mr. Knapp, I would ask that the Court consider  
7 allowing that deposition to be videotaped, then, and used --

8 THE COURT: That is between the parties. I  
9 don't see any hangup with authorizing a videotaped  
10 deposition. I will authorize you to have that videotaped, if  
11 one or either side desires that.

12 I am not ruling on the admissibility of  
13 that at this point. That may depend on some other factors  
14 involved in the case.

15 MR. BUTNER: Okay. The goal, of course, if we  
16 do a videotaped deposition would be that that be used in lieu  
17 of Alexander Knapp's live testimony at trial.

18 THE COURT: I recognize that there may be some  
19 difference of opinion between counsel with regard to that,  
20 and the question would remain whether he is available or  
21 unavailable for future testimony, I suppose, at that point.

22 MR. BUTNER: Thank you, Judge.

23 THE COURT: That is not an issue I am ruling  
24 on. I am just simply ruling that either side may have that  
25 videotaped deposition so that the possibility could be there,

1 that if both sides are satisfied with the results, it  
2 possibly could be used for that purpose. I am not ruling on  
3 whether it would be admissible.

4 And so you may serve a notice of  
5 deposition at whatever time and convenient location you  
6 choose.

7 MR. SEARS: We will, Your Honor.

8 THE COURT: And I may or may not authorize the  
9 closed-circuit video at the time of the trial. Depends on  
10 where things go from here.

11 MR. BUTNER: Okay.

12 THE COURT: Okay. Did we have the other  
13 civilian?

14 THE BAILIFF: Not at the time. I looked. Let  
15 me take one more quick run.

16 THE COURT: Some of that may have to do with  
17 our changed location. I think she was notified of it being  
18 down here, though.

19 With regard to that question that was  
20 having to do with the potential juror Smith, who noted some  
21 post-filling out questionnaire communications. I was  
22 advised -- or my office was -- by the jury commissioner's  
23 office that they had understood from something that the  
24 potential juror said at the time of filling out the  
25 questionnaire or reporting the incident to her that she may

1 not have been in town this week, so I can't confirm that she  
2 has actually received notice. The jury commissioner's office  
3 was attempting to contact her by phone. My office issued the  
4 order and sent it by mail to the address, but the jury  
5 commissioner had an understanding that the juror may not have  
6 been returning to town until the 12th. Obviously, we haven't  
7 gotten there yet.

8 The bailiff advises that she is not  
9 present. So we may have to defer that question to a later  
10 point in time, as far as examining her to determine what  
11 contact, if any, she had with other potential jurors.

12 MR. HAMMOND: Your Honor, if it is case that  
13 she is not going to be here today and the information that  
14 you have is that she is out of town, I think it would still  
15 be valuable for us to have her here when we get back together  
16 on the 13th.

17 THE COURT: That was my thought exactly.

18 So, to the extent that I can do so, I  
19 will issue another order, and we'll try and have the jury  
20 commissioner's office communicate with Miss Smith so that I  
21 can have her here first thing when we resume on the 13th and  
22 at least enlighten us about the lack of clarity in my  
23 admonitions. So I will issue such an order and have her come  
24 on the 13th.

25 Moving on, there were a couple of things

1 that looked like they might need to be more urgently  
2 addressed, and I would suggest that one of them may be the  
3 issue of interviewing Ruth Kennedy. I don't know if you have  
4 some other thoughts on other motions that need to be taken up  
5 more urgently than that.

6 MR. SEARS: Your Honor, in terms of the  
7 motions, that is a good one to start with. There are some  
8 matters not related to pending motions, but things we talked  
9 about last time we were together that we have given  
10 considerable additional thought to, that if you wanted to  
11 take some time now, we thought would be appropriate.

12 The first area, generally, has to do with  
13 the continuing jury selection process. And we have spent a  
14 great deal of time working with the questionnaires,  
15 consulting with our jury consultant expert at length about  
16 this. And there are a couple of things, and one of them is  
17 still an issue for us, which is how we are going to proceed  
18 on May 4th, and how many jurors would be summoned, and how  
19 they would be examined. And I think we have a sharper focus  
20 on that, that we could share with you, if you are inclined to  
21 hear about that.

22 THE COURT: I am.

23 MR. SEARS: Okay.

24 THE COURT: I will note that my office  
25 received some communication from the jury commissioner about

1 where you all, both sides, stood on calling other jurors in  
2 this week, and my understanding was you think you have a  
3 sufficient number as of right now to deal with. She was  
4 going to cancel the rest for this week.

5 MR. SEARS: We do. And we had something in  
6 the neighborhood of 315 completed questionnaires that we have  
7 been working with. The originals have now all been returned  
8 to the jury commissioner and scanned copies have been  
9 provided to the State. And here is the approach we have  
10 taken, and we think it makes -- to us it makes good sense,  
11 and we hope it makes sense to the rest concerned in this  
12 case.

13 But what we did was to start going  
14 through them with an eye that there would be certain jurors,  
15 from answers to the questionnaires, that everyone could  
16 quickly agree were not able to serve for hardship reasons.  
17 Primarily, jurors who answered clearly and unequivocally that  
18 they had long-standing pre-paid travel plans for some period  
19 of time in the suggested range of dates for the trial. And  
20 we produced a list of those jurors, and we e-mailed those,  
21 late last night, to Mr. Butner and said to him in an e-mail  
22 message transmitting that, that these were the people that we  
23 felt that anyone looking at the questionnaires would conclude  
24 have irreparable hardships. There were a couple that were  
25 not purely travel-related. There were a couple that had

1 serious personal illnesses. There was one person whose  
2 answers were pretty clearly evidence of some severe thought  
3 disorder on his part. There was one gentleman that couldn't  
4 read and produced a letter saying that he couldn't read and  
5 that he could fill out the questionnaire if somebody read it  
6 to him and he gave his oral answers. And so we've added that  
7 person to the list.

8 And so our hope would be that the State  
9 could quickly review this list of people and, of course, at  
10 any point in this process if they have questions about  
11 individuals that we think are in this group or other people  
12 that they want to add to the mix, then we would have this  
13 list. And we think those people can, under the rules, be  
14 excluded by the Court on that business from the  
15 questionnaire, without having to come in.

16 Then we have had a number of different  
17 discussions internally about what to do with the remainder.  
18 That number, by the way, is somewhere between 35 and 50. We  
19 didn't count them up, but on our spreadsheets it was two  
20 pages. So I would estimate that to be about 35 to 50 people  
21 that we think, if they came here for traditional voir dire,  
22 would be dismissed very early in the process.

23 Then we had groups of people that we were  
24 looking at and evaluating on a number of different levels,  
25 using different matrices to get information. It occurred to

1 us, based on experience -- and this is an idea that  
2 Mr. Guastafarro brought to the table -- that rather than  
3 spend the time between now and the 13th and on the 13th,  
4 arguing about cause challenges, people that, for one  
5 reason or another, based on something they said in the  
6 questionnaire, one side or the other, we'd suggest, should be  
7 excused for cause off their questionnaire answers. Maybe it  
8 would be better to look at this in a more positive way.

9                   And so we produced a list that we will  
10 forward -- as soon as we are able to put it together,  
11 probably this morning -- to the State, of about a 124 names  
12 of people. And these people, we think, based on our reading  
13 of the questionnaire, did not provide enough information on  
14 the questionnaire so that anyone, the Court or either side in  
15 this case could say clearly that person should not serve.  
16 These people are not -- I don't want to make the  
17 overstatement that these people are qualified to serve. They  
18 are simply people that survived the first cut and should be  
19 brought in for questioning.

20                   That number, 124 people who don't clearly  
21 express something that we think would be a cause  
22 disqualification, those people, I think, are a sufficient  
23 number for us to get to 36, if that is the number we are  
24 seeking. We have given some thought that maybe we even want  
25 that number to be a bit higher, maybe 40 -- but somewhere in

1 that range.

2 We think there is a high probability that  
3 from this group of people we could get the strike pool  
4 produced in this case. That would mean that the people about  
5 whom there is going to be considerable argument because of  
6 their views on any number of things -- on publicity,  
7 knowledge of the case, statements about the death penalty,  
8 other things that came up in the questionnaire -- we can put  
9 those people to the end of the line and only consider  
10 bringing in any of those people on a limited basis, should we  
11 not get the strike pool out of the 124 first group of people.  
12 And it just seemed to us to be a way to expedite the process.

13 And rather than bring the difficult  
14 people in at the beginning and take the time to do that, put  
15 them behind the people that, at least at a first-cut level,  
16 would be people who could be talked to in more depth about  
17 whether they could and should serve on this jury. So that is  
18 our proposal. And we think that would greatly reduce the  
19 time on the 13th that we otherwise thought we'd be occupied  
20 discussing strikes off the questionnaire that we want and  
21 whether the State had any or not.

22 Now, to be more thorough on this, looking  
23 at this group of 124, there are jurors on there who have  
24 expressed things that seem to be things that the defense  
25 would embrace, and there are just as many people on that list

1 that would say things that we think the prosecution would be  
2 looking to hear. This is not some sort of cherry-picked  
3 dream pool for the defense comprised of people. What we are  
4 trying to do is to weed out people whose views are so  
5 extreme, one way or the other on a lot of these topics, that  
6 they would be controversial and probably be struck off the  
7 questionnaire and try to bring in a group of people who, at  
8 an early screening level, would appear to be people that  
9 could potentially serve on this jury. So that gives us  
10 enough people, and that gives us a cushion.

11 And if you take the 315 and you subtract  
12 35 to 50 hardship strikes, then you subtract the 124 -- I  
13 think that's the number of people on our pool list -- the  
14 people to be brought in on May 4th and thereafter, then the  
15 remainder is enough of a cushion so that if for some reason  
16 we went through the 124 and didn't have a strike pool yet, we  
17 could start reaching into that group to see if we could find  
18 other people, and I think that is a more efficient way to do  
19 it.

20 What this really illustrates, for us at  
21 least, is the need for individual voir dire, and the idea  
22 that small group voir dire or old-fashioned large group voir  
23 dire would be a real problem. And we've seen this -- the  
24 potential of taint already from people like -- like the juror  
25 that didn't appear this morning. The idea would be that if

1 we had 124, that's -- if we brought them in at 15 a day,  
2 that's less than 10 per day.

3 And this -- when we get right down to the  
4 logistics of it, Judge, this is what we see happening. If we  
5 brought in 15 on Day 1 and we didn't get to 15, and we saw 12  
6 and there were three left over, it would be an unreasonable  
7 burden on the jury commissioner to then call three people off  
8 the second day list and push them off, so that we never  
9 brought in more than 15 on any one day. Fifteen is a number  
10 that we think is somewhat optimistic, but we think it's  
11 reachable, and I think we can get close to 15 per day,  
12 particularly if we use our methodology and the 15 are drawn  
13 from this group of people who made the first cut.

14 And the -- doing it any other way,  
15 bringing in larger groups means if you brought in 30 or 45 or  
16 50 and only saw 15, then you have got this real crunch at the  
17 end of the day and overnight of what do we do, do we push  
18 those people off to the next day? So you have another 35 or  
19 45 or 50 coming in, plus the 20 you didn't see the day  
20 before, and then we start getting large groups of people.  
21 And first and foremost, that is not respectful of their time.  
22 These are the people that are going to be upset that they  
23 have to come back day against day to be seen this case, and  
24 spend a lot of time sitting around for brief periods of  
25 activity when they are actually called for voir dire.

1                   So we think our process will actually  
2 streamline the way in which we go about doing this, minimize  
3 the possibility of juror against juror taint, reduce the  
4 workload on the jury commissioner if we don't reach the  
5 number each day, and get us to a strike pool more quickly  
6 than some other process.

7                   I think there is a good possibility that  
8 we would never have to have your time involved in arguing  
9 cause strikes off the questionnaire, if we do it in this  
10 order. I think that we skip over that process, and we can  
11 use the time on the 13th to focus in on fine-tuning the  
12 hardship list and coming to some agreement.

13                  And again, on this list of 124, if the  
14 State thinks that there are people in that list that don't  
15 pass their first cut, that can be discussed on the 13th. I  
16 think we are talking about a very short list of people.  
17 Similarly, if the State has additional people that they think  
18 ought to be brought in to be questioned, then that can be the  
19 focus of the discussion on the 13th, rather than talking  
20 about a couple of hundred jurors, one at a time.

21                  You know, we have our own system for  
22 managing and summarizing and using data off the  
23 questionnaires, but the question is -- you know, there are  
24 two boxes. I have two banker's boxes full of questionnaires  
25 in my office and three CDs, so it is a lot of data. But I

1 think the way in which we are looking at this, we can help  
2 the Court and help the State with our summaries, and we can  
3 take both the Court and the State to the places in the  
4 questionnaires where people have said things of particular  
5 interest. You know, there is no substitute for reading all  
6 of the questionnaires, but we think our focus will at least  
7 help at the outset, rather than sitting down and reading  
8 every questionnaire one at a time to each other and then  
9 having a discussion.

10 So that is our proposal, Judge. And so  
11 we would like some clarity today going forward that this is  
12 what -- we can make the first part of this happen. We can  
13 transmit this -- what we call the "pool list," which is 124  
14 names to the State, almost at any time. That is ready to go  
15 probably in the next five or ten minutes. And then sort of  
16 take it from there.

17 And we also thought that doing it this  
18 way minimized the need for us to take Mr. Butner and  
19 Mr. Paupore's valuable time between now and the 13th for a  
20 face-to-face meeting. We think actually we can do this work  
21 through e-mail.

22 THE COURT: Mr. Butner.

23 MR. BUTNER: Judge, I understand what  
24 Mr. Sears is suggesting. First of all, I don't think that  
25 anything about this process has streamlined the jury

1 selection. We just seem to add more and more time all along.

2 But what I think is a real problem is  
3 that this 124 list, so to speak, that in the defense opinion  
4 don't clearly express any problems, I think really what that  
5 is is an opportunity for the defense to pre-cull jurors that  
6 they think might be appropriate for their case, and I don't  
7 think that that's the way that we should be doing this.

8 THE COURT: Well, that is not how he proposed  
9 it. He proposed --

10 MR. BUTNER: I understand.

11 THE COURT: -- he proposed that you be able to  
12 add others, or maybe there are some in the 124 that would  
13 not -- that your idea of what a fair and impartial juror  
14 might be, so --

15 MR. BUTNER: Judge, these jurors have a right  
16 to serve, also. And, you know, it is sort of interfering  
17 with that right to go ahead and pre-cull this list. There  
18 are a number of these people that are going to be  
19 rehabilitatable, so to speak, by way of the oral examination.

20 And I don't think that it is right to cut  
21 them off at the pass and have this pre-selected 124. I think  
22 we are better off doing it the way that we started out. This  
23 is just exactly the kind of problem that I envisioned at the  
24 outset when we embarked on this process. I understand the  
25 principle of individual voir dire and that -- that I think it

1 could be more expeditiously handled, but I understand why the  
2 defense wants it done that way -- the problem of taint.

3 But to take a select 124, when we have a  
4 number of others out there, and pull them out of that, as I  
5 understand it, that bunch, I don't think that is a good way  
6 to do it. I think we should just take it as they come, and  
7 give these people an individual opportunity to serve as  
8 jurors.

9 Now there may be some that I can talk  
10 with the defense about, and we would agree, as suggested by  
11 Mr. Sears, that this person has evidenced such extremes views  
12 on their questionnaire that they just can't serve. Okay?  
13 That is a distinct possibility.

14 But to cut the others off at the pass, so  
15 to speak, I don't think that that is right, I don't think  
16 that that's legal, and I don't think it is appropriate under  
17 the circumstances that those people be weeded out before  
18 they've even have a chance to be examined and possibly  
19 rehabilitated.

20 So that is the State's objection to this  
21 process in that regard, and I don't think we should go that  
22 route.

23 THE COURT: Mr. Sears.

24 MR. SEARS: Thank you, Your Honor.

25 We can certainly provide Mr. Butner with

1 the list of those jurors, which is a larger list than 124,  
2 that we think we have put them in a group we call "cause."  
3 And there are people in there that have expressed extreme  
4 views about the death penalty. There are people in there  
5 that have made it clear that they have pre-judged the case,  
6 based on what they have been told. Disturbingly, there are  
7 people there that say they have talked to law enforcement and  
8 people inside the prosecution and obtained information that  
9 causes them to have an irrevocable opinion about the case.

10 The other group -- so that we are talking  
11 about the same thing -- the other group are not people that  
12 have been people pre-screened for attitude. They are simply  
13 people from the questionnaires who have not, by contrast,  
14 expressed such a clear opinion one way or the other. "I  
15 could never impose the death penalty," or "I will always  
16 impose the death penalty, no matter what the circumstances  
17 are."

18 These people have said things, as I  
19 suggested, that I think the State would embrace, about the  
20 death penalty and about its appropriateness and what it would  
21 take to convince them and probably will be subject to a  
22 challenge for cause from what -- you know, if they are  
23 leaning towards the death penalty in more cases, they may be  
24 a cause challenge candidate. But the only screening that has  
25 been done is that from the face of the questionnaire, they

1 have not said something that is so clearly extreme that we  
2 could hand them to you with good faith and say you can  
3 challenge this person for cause. And they are not off the  
4 panel. We are not striking these people.

5 We are simply saying that as a matter of  
6 efficiency, if you know you have 214 jurors who have already  
7 in a questionnaire said something that is so extreme that one  
8 side or the other or the Court are likely to strike them for  
9 cause, would it make sense to bring those people in first or  
10 mix those people in if we could take people that everyone  
11 agreed, hopefully looking at it, have at least expressed  
12 enough of an open mind about this case that they're worthy of  
13 further examination. I am not suggesting that those people  
14 will be cause free. To the contrary. I think there are a  
15 lot of troublesome people in that group.

16 But it's just a matter of ordering the  
17 jurors -- it is not taking away the right of these other  
18 jurors to be heard. It is simply trying to figure out what  
19 is the most efficient way to use limited resources to get to  
20 a strike pool in this case without removing a single right of  
21 the State in this case or right of the defendant to be heard  
22 on a challenge for cause. And that's all we have done.

23 And the process of meeting with  
24 Mr. Butner and the prosecution team to talk about these cause  
25 challenges is still out there. In fact, that was our initial

1 idea, that we would do that. But when we saw -- and I think  
2 I may have said a couple of times that I was expecting strong  
3 answers, and I wasn't disappointed, in these  
4 questionnaires -- the number of people that we would have to  
5 talk about is a daunting number.

6 And so we thought it more efficient to  
7 take a smaller list of people, but a sufficiently large list  
8 of people, who have not, on the face of their questionnaires,  
9 disqualified themselves, and put those people at the front of  
10 the line to be brought in on May 4th. And I think, you know,  
11 we could do that. We could sit there and argue cause  
12 challenges back and forth for the other 200 and probably come  
13 very close to the same idea that of the 200-and-some people  
14 on our cause list, most of those people are going to wind up  
15 being struck.

16 And if the State insists that they be  
17 brought in, we're going to take our time in court, the most  
18 expensive time of all, and strike them for cause, based on  
19 what they said, which is why we suggested a questionnaire in  
20 the first place.

21 So with all deference to the State's  
22 ideas, I think what we are saying is a way to manage 315  
23 people, and a way to do it that is most likely to produce a  
24 strike pool in a reasonable period of time, without the idea  
25 of bringing in people that, if we laid their questionnaire

1 out and took five minutes to look at it before those people  
2 came in, we would never make it to the box. Thank you.

3 THE COURT: I don't see a legal obstacle to  
4 doing a semi pre-cull, if that is how you want to call it,  
5 but I am under the impression that this was something that  
6 just was a proposal to Mr. Butner and the State's side. And  
7 so I think they need to take a look at what your list entails  
8 and that sort of thing. Perhaps some agreement could be  
9 reached for some of the numbers before the 13th, where we  
10 don't have to argue about them, but --

11 MR. BUTNER: Just to clarify, Judge, they sent  
12 an e-mail to me, I guess last night. I have to -- you know  
13 where I live. I have to come directly to Prescott and get  
14 here at a decent hour so we can proceed. So I have not seen  
15 that e-mail. And if they're going to send an e-mail, I hope  
16 it would be copied to Mr. Paupore so that, you know, we've  
17 got a copy over here in Prescott, rather than where I'm at  
18 over in Camp Verde, so I can see it promptly. But that is  
19 part of the problem, too.

20 THE COURT: Well, if you wouldn't mind copying  
21 Mr. Paupore on anything that is sent out. I don't know if  
22 Mr. Paupore was or was not copied on this particular item,  
23 but to the extent that you can consider what the defense has  
24 raised this morning, Mr. Butner and Mr. Paupore, take a look  
25 at it, and perhaps that will reduce the time that we need on

1 the 13th. I don't know. I will leave that to you folks.

2 MR. SEARS: I will speak in defense of  
3 Mr. Hammond and his computer skills. We were at a place and  
4 time when Mr. Hammond didn't have access to Miss Cowell and  
5 Mr. Paupore's e-mails. An e-mail to Mr. Butner says that and  
6 says would you please shoot this to them, and in the morning  
7 we will send them around, and we'll do that. We have e-mails  
8 in both places.

9 THE COURT: Thanks. I appreciate that.

10 MR. BUTNER: I understand those technological  
11 limitations. Got them myself.

12 THE COURT: All right. I will say this:  
13 Conceptually, I don't have a major problem. If the parties  
14 can work out some reduced number from which we are going to  
15 derive the jurors who actually come in and then randomize  
16 those.

17 To the extent that anybody has a right to  
18 serve on jury, it is not a particularized right with regard  
19 to any particular case, in my opinion. They have a right to  
20 serve on juries, yes, but I don't know that anybody has a  
21 constitutional right to serve on a particular jury. And so  
22 to limit the number that we call in and then randomize that  
23 list I don't think has legal objections to it or  
24 constitutional objections to it, such that the Court would  
25 recognize standing on the part of somebody who doesn't sit on

1 the jury.

2 I suspect most people acknowledge their  
3 civic obligation to serve on a jury. But for serving on a  
4 particular jury for a lengthy time, I think you probably  
5 would not have many of the 315 objecting to being pre-culled,  
6 but that is more an observation.

7 MR. BUTNER: Judge, if I might just make one  
8 statement to clarify.

9 THE COURT: Yes.

10 MR. BUTNER: I understand what the Court is  
11 saying, and I maybe didn't make my objection clear. I don't  
12 know the basis for the defense culling this list out, and so  
13 it could --

14 THE COURT: I could tell.

15 MR. BUTNER: -- it could be that there are  
16 constitutional issues with the manner in which this list was  
17 formed by the defense, and that is why I noted that  
18 objection. Thank you.

19 THE COURT: Okay. If there are people that  
20 are obvious challenges for cause, I think that both sides can  
21 probably reach some understanding of that and take those out  
22 of the mix, so that when we are drawing the list up and then  
23 randomizing it, it would produce the numbers that we are  
24 going to spend a lot of time with when we do get to the  
25 individualized voir dire. I still am not opposed to

1 individual voir dire, and the numbers, based on the  
2 experience of the parties, would seem to lend itself to 15 or  
3 16 people a day because of the number of hours that we have  
4 in court and the amount of questions that both counsel may  
5 have -- both counsel for either side may have for particular  
6 jurors, with any luck, with some degree of agreement on who  
7 comes in and who is challengeable for cause, we can get  
8 through those numbers and get a jury panel to do the strikes  
9 from of 36 to 40 more quickly than the number of days that it  
10 would take to go through the whole grouping of them.

11 Mr. Sears.

12 MR. SEARS: Just so we can be clear here,  
13 Counsel, here is what we did. We sent you an e-mail --

14 THE COURT: I don't think you need to explain  
15 it again, Mr. Sears.

16 MR. SEARS: I didn't think I did either,  
17 Mr. Butner stood up and said he didn't understand how we did  
18 this, and I think it is pretty simple, what we did. But what  
19 I will offer to do is, so that the picture is complete, they  
20 will have one list, which is the list of hardship people,  
21 about whom we think there should be little or no dispute, the  
22 people have expressed a clear, traditional "I can't be here  
23 every day" --

24 THE COURT: In fact, you said they have that  
25 already.

1                   MR. SEARS: Yeah, they have that. We've now  
2                   circulated that to Mr. Paupore and Miss Cowell.

3                   Now, the second list, which will be  
4                   coming shortly, is this list. I would resist the idea of  
5                   saying that it's a cull list. This is simply a list of  
6                   people that on the face of their answers in the  
7                   questionnaires did not say something so extreme or so clear  
8                   about something that would be disqualifying as to be in the  
9                   bigger pool of cause strikes.

10                  These are people that we think are  
11                  reasonable people to be brought in to be questioned further.  
12                  We are not suggesting that they are cause free or that this  
13                  is some group of people that would not need to be carefully  
14                  questioned. They just didn't say something that was so  
15                  clearly a basis for a cause strike by one side or the other  
16                  in this case.

17                  But what we will do, so that the State  
18                  can see by comparison, we will send the remaining list, which  
19                  are the cause strikes. And I think that if they looked at a  
20                  few representative questionnaires there, it would jump out at  
21                  them, and we might even be able to provide them with some of  
22                  our summaries saying take a look at their answer to these  
23                  questions, and then tell us if you don't agree that these  
24                  people have disqualified themselves based on their  
25                  questionnaire answers. For example, one of the potential

1 jurors is Mr. Butner's secretary.

2 MR. BUTNER: Which I have no objection to  
3 being excluded.

4 MR. SEARS: She came in and filled out a  
5 questionnaire, though, and that raises some other issues. We  
6 wished that that had been brought to the Court's attention  
7 sooner rather than later.

8 MR. BUTNER: She doesn't consult me about her  
9 activities. I found out about it after the fact.

10 THE COURT: All right. Well, please take a  
11 look and continue to communicate prior to the 13th and see if  
12 you can enter any other stipulations or agreements with  
13 regard to particular members of the jury panel prior to 13th,  
14 where we are not arguing over things that are not necessary  
15 to argue over.

16 Next issue.

17 MR. SEARS: We are still talking about matters  
18 that we think impact jury selection. One of them was my  
19 colleagues were able to see the Division Two courtroom for  
20 the first time on Friday and were as wide-eyed as children on  
21 Christmas morning. They said, "This is a big room."

22 And it occurred to us that -- we started  
23 working very hard and doing diagrams and thinking about the  
24 logistics of trying this case in your court. And one of the  
25 things that we think is going to be somewhat awkward is the

1 way in which sidebars are going to be conducted in a case  
2 with a big jury like this. And we think, unfortunately, this  
3 may be a case in which there may be frequent sidebars. And  
4 the practice of going down the little hallway and back into  
5 your chambers is time-consuming, burdensome on Roxanne, and a  
6 bit disruptive.

7 We started looking at the layout of the  
8 courtroom and the location of tables and where things like  
9 ELMOs and projectors and laptops would go, and how to be in  
10 that courtroom and be in the right place and not tripping  
11 over each other and not blocking sight lines for jurors. And  
12 I'll just ask whether there is any possibility of suggesting  
13 to Judge Brutinel that this is a kind of case that might  
14 better be tried in his courtroom, and that if we provided him  
15 with regular coffee and donuts in your courtroom, if there  
16 was a chance of doing it -- it's just that the space --  
17 particularly the space between the bench and the rail in that  
18 courtroom is so much bigger, the sight lines are so much  
19 better, the seats are more uncomfortable for the crowd. But  
20 everything else about that courtroom, I think, solves some of  
21 these problems.

22 And I remember from a million years ago  
23 being able to do sidebars off the judge's right-hand side,  
24 down there by the door, and being pretty confident that they  
25 are out of the range of hearing of the jury. And it just

1 occurred to us that that courtroom would be so much better on  
2 some of these matters.

3 And if not, perhaps we could take some of  
4 your time -- maybe even if we wind up not using all of the  
5 day on the 13th on jury selection matters, maybe we could  
6 spend a little bit of time brainstorming in your courtroom  
7 about whether there was something that can be done. But I  
8 would just ask politely that an inquiry be made about the  
9 availability of the Division Two courtroom for this trial.

10 A couple of other unrelated --

11 MR. BUTNER: Judge, if I might respond to  
12 that.

13 MR. SEARS: Sure.

14 THE COURT: I can make inquiry, but it doesn't  
15 mean it would be fulfilled even if I make inquiry. Go ahead.

16 MR. BUTNER: The one problem that it is not  
17 going to solve is the acoustics problem in that courtroom.

18 THE COURT: The court reporter probably joins  
19 you in that observation.

20 MR. BUTNER: It is just extremely difficult  
21 for everybody, I think, to hear. And some of us already have  
22 some hearing limitations, and I am thinking for myself at  
23 this point in time, I think. So, I think that that's an  
24 issue.

25 It may be that we will be able to work

1 out some of the other problems like sidebars and so forth in  
2 some other fashion, but I don't think it is such a great idea  
3 as a result of the difficult acoustics there.

4 THE COURT: All right. I'll ask Judge  
5 Brutinel, and we are talking such a long trial here, I am not  
6 sure that he can accommodate that in any event.

7 MR. SEARS: I would be willing to bet that  
8 temporary sound arrangements could be made in that courtroom  
9 with things that the County already possesses -- microphones  
10 and things that would allow some of that problem to be  
11 solved. I think that if there were a better need of sound  
12 system in that courtroom, the acoustics problems -- all of us  
13 practiced in there when there were no microphones and shag  
14 carpeting and a big chandelier, and the windows were open in  
15 the summertime. So I think it's better than it was.

16 But just from a spatial point of view and  
17 a logistical point of view, that area is just so big compared  
18 to what we are working with in your courtroom.

19 THE COURT: I kind of like the federal  
20 courtroom, too, but I don't think --

21 MR. SEARS: You know, that's a possibility.  
22 And I don't know whether that's even available --

23 THE COURT: No, it is doubtful the U.S.  
24 Marshal service, anymore -- because they have to provide  
25 security as a federal facility, aren't as gracious as they

1 used to be. It's not a slam on them, but can't be as  
2 gracious as they were in former days with regard to that.

3 MR. SEARS: Is that worth even talking about?

4 THE COURT: I don't think so, not based on my  
5 recent experience -- not personal, but with the system here  
6 in State court asking for it, it's -- they aren't readily  
7 providing that as they may have done in the past.

8 MR. BUTNER: Well, I would also like to draw  
9 the Court's attention that there are, apparently, according  
10 to my paralegals, some significant wireless limitations in  
11 Division Two, also.

12 THE COURT: Are there?

13 MR. BUTNER: Yeah. It is much more difficult  
14 in there than it is in your usual courtroom. Thank you.

15 THE COURT: All right.

16 MR. SEARS: One other thought, after spending  
17 so much time with the questionnaires and focusing on this  
18 issue, a number of potential jurors answered questions  
19 indicating that they had been convicted of crimes and had  
20 been sentenced for those crimes. And we wondered, without  
21 knowing whether the State had or intended to run criminal  
22 histories on any of those jurors, whether they thought they  
23 could or should -- but we would ask this: If they do or  
24 have, that whatever they obtain on those or on any other  
25 jurors, be provided to the Court and to us in advance of jury

1 selection. It is something that we don't have access to and  
2 the Court doesn't have access to, but I think it would be  
3 important because it would, again, streamline those  
4 questions.

5 For example, we got the impression that  
6 one or more potential jurors had a felony conviction, but  
7 presumably, their rights were restored. It would be  
8 relatively easy to determine that from their criminal history  
9 in a case like this.

10 But I am also concerned, just on a  
11 practical level, if the jurors self-disclose that  
12 information, are they accurately and fully disclosing the  
13 extent of their criminal history, particularly from some  
14 other state. It's not easily searchable by us. So that  
15 would be my request of the State.

16 THE COURT: Mr. Butner?

17 MR. BUTNER: Judge, in regard to running  
18 criminal histories, and I am sure the Court is fully aware,  
19 there is a special protocol on that sort of thing, in terms  
20 of disclosure and so forth. Certainly we wouldn't be  
21 precluded from disclosing to the Court, but I think probably  
22 a better way to handle that would be if we do run these  
23 criminal histories and we see that there is reason to do  
24 that, we would provide to the Court and counsel those felony  
25 convictions that are still on record, so to speak.

1                   And in terms of -- as the Court is aware,  
2 I think, in terms of our jury cards and that kind of thing,  
3 we have always provided that information to the defense  
4 voluntarily, and we will continue to do that. I think that  
5 that basically addresses that issue appropriately.

6                   THE COURT: Thank you.

7                   MR. SEARS: That's wonderful. I was going to  
8 ask -- I was going to ask whether they still did jury cards,  
9 and if they did -- and in my personal experience, I have  
10 never gotten them. So this is a wonderful new day for that  
11 idea, and I would ask that if they have that, if they  
12 disclose that as quickly as possible, we would be very much  
13 interested in that.

14                   On the criminal history, though, the  
15 question of felony convictions goes to their qualifications  
16 and fitness to serve as a matter of statute. But I think  
17 their criminal history on misdemeanors and some other things  
18 may certainly play on questions involving voir dire and their  
19 contacts with the judicial system. They were asked questions  
20 about it and, in fact, it's in those questions that they  
21 self-disclosed this, because the presumption was they  
22 wouldn't be on the jury list to begin with if they had felony  
23 convictions without their rights restored.

24                   THE COURT: I would think. I appreciate the  
25 candor by Mr. Butner and willingness to help.

1 MR. BUTNER: Thank you, Judge.

2 MR. SEARS: The last matter -- not the last  
3 matter, but one of the next matters is the ongoing video  
4 conferencing -- the grand experiment. We have continued to  
5 try, and we've been in communication with the County.  
6 Remember, this is a matter that we put over until today for  
7 further discussion, and I have -- Mr. Robertson prepared a  
8 little flow chart of where we are now for your reading  
9 enjoyment.

10 And what we are trying to show here is  
11 the way in which this -- this is not a hundred percent of the  
12 system, but the tests we have been running have been with  
13 three different sites -- my office, Mr. Robertson's R-3  
14 investigation, and the firm of Osborn Maledon in Phoenix.  
15 Three different locations, three different laptop computers  
16 showing audio and video.

17 And what's happened, as recently as the  
18 end of the day yesterday, was yet another experiment, we now  
19 decided that rather than having Mr. DeMocker pulled and  
20 handcuffed to the wall, we are having the sergeants --  
21 depending on which sergeant it is, come in and do this link,  
22 and we're going back and forth.

23 And one of the problems we have -- and I  
24 want to make it clear that I don't think anybody on the  
25 County side is doing anything other than trying to make this

1 work. We are not suggesting bad faith. The problem is the  
2 goalposts keep moving.

3 And there was a discussion over the last  
4 few days about maybe using a different IP Internet address,  
5 and we tried that. And then late in the day yesterday, one  
6 of the County people with whom we have been working pretty  
7 closely said "Well, wait a minute. You are supposed to  
8 schedule these multi-site interviews through the County MIS  
9 office" -- just a completely new first-time out-of-the-box  
10 never heard that idea before, so we haven't had a chance to  
11 do that.

12 But the net result is still the same as  
13 it was when I spoke to this the last time: Despite our best  
14 efforts and what we think the best efforts are of the jail  
15 and the County MIS, it has still never worked, and there has  
16 always been something wrong. The confusing thing is that it  
17 never seems to be the same problem time against time, that  
18 sometimes parts of it work in one way, and the next time you  
19 do it something else changes, and the problems shift around.

20 I think the logistical problem at the  
21 jail end, in terms of getting Mr. DeMocker in there and  
22 whether he needs to be handcuffed or not, can probably be  
23 worked out, maybe at the captain level -- maybe the sergeants  
24 and the DOs just don't feel comfortable changing policy for  
25 that, but I think we can work around that. But we can't make

1 the system work, and we can't make it work in the way in  
2 which it was intended to work, which is to allow conferences  
3 between -- this is a conference that would involve what we  
4 consider to be the core defense team -- the lawyers and R-3  
5 investigations. And then we want to use it for experts and  
6 other people in lieu of having them come up and try to find a  
7 place in the jail to sit down and meet with  
8 Mr. DeMocker.

9                   So this is where we are. And the ball  
10 has really not moved much past mid-field for the longest  
11 time, and it seems like there is some new problem or new  
12 requirement or new idea or new issue every time you try to do  
13 this. And everybody kind of laughs about it, but nobody has  
14 a solution, and nobody has a way to make it work, and now we  
15 are a month from trial.

16                   And the problem is exacerbated in a way  
17 that I can't even describe to you and will try to describe  
18 later on today by ongoing disclosure from the State. We have  
19 gotten two disclosures in the last 24 hours and a third one  
20 last Friday that disclosed 60,000 e-mails. So this problem  
21 is stuck.

22                   And the problem is devoting our time and  
23 resources to it is a real problem, and I am not sure at what  
24 point we have the time any longer to try to make this work.  
25 We barely have enough time to use it if it worked properly,

1 but the idea of spending more and more of our time and  
2 resources and taking away from other things to work on this  
3 is just hard to imagine right now.

4 So that is where we are this morning. I  
5 declared it a failure, and I am afraid I have to say that my  
6 opinion has not changed.

7 THE COURT: Any observations on that issue,  
8 Mr. Butner?

9 MR. BUTNER: First of all, Judge, nobody is  
10 laughing about this. This is serious business. And I don't  
11 know what to do about this.

12 I can talk with Mr. Fields, again, and  
13 see if he has any insights into what is going on there. This  
14 is an ongoing problem, and I would hope that this can be  
15 corrected immediately. I don't know what to say about it  
16 because I just heard more about it, and I would ask leave of  
17 the Court to inquire and see if I could find out some more  
18 information about it. I think the Court knows that I, on  
19, behalf of the State, have always taken this very seriously.

20 THE COURT: I will defer further action at  
21 least until later this afternoon.

22 MR. BUTNER: Okay. Thank you.

23 MR. SEARS: Judge, our notes from our last  
24 session indicated that what Mr. Butner is proposing to do now  
25 is what he said he would do prior to this morning's hearing.

1 We expected to see these people here this morning.

2 MR. BUTNER: Well, right after the hearing  
3 last time, we provided Mr. Sears with another type of  
4 telephone number, so to speak, to connect to -- and they  
5 thought at that point in time that that would cure the  
6 problem. So I don't think that it is appropriate that  
7 Mr. Sears say that I didn't do anything about it. I thought  
8 it was handled at that point in time, and I haven't heard  
9 otherwise until just this moment.

10 THE COURT: Thank you.

11 Any other urgent issues that you had?  
12 Otherwise, I would like to move on to talk about some of the  
13 things that have to be done before the trial, such as the  
14 interview of Ruth Kennedy.

15 MR. HAMMOND: I would like to get on to that  
16 as well as the Court would, but just in terms of things that  
17 were left undone from the last hearing, we were hoping to get  
18 a report from the prosecution about the further testing done  
19 at the Sorensen Laboratory. I think that the Court  
20 requested, and Mr. Butner agreed, to provide us with a  
21 summary of what had been done up there, and I don't believe  
22 we have that.

23 MR. BUTNER: I don't have complete information  
24 on what additional testing has been done at this point in  
25 time. But I do know that until Friday of last week, at least

1 if my information is correct, the defense expert was there  
2 observing the testing that was going on. This testing being  
3 additional DNA testing, where it was not completed by the  
4 D.P.S. crime lab or where they indicated that there was  
5 additional DNA left on the items that they had tested, and  
6 they got partial profiles and so forth, and that additional  
7 DNA that was left on the tested items could have been  
8 gathered but was not gathered by D.P.S., and so it was taken  
9 to Sorensen Lab to be gathered. So that's the gist of the  
10 testing.

11 I also have been informed that I should  
12 be able to provide the defense with a report concerning the  
13 Sorensen testing on Tuesday of next week, which would be the,  
14 so to speak, two-weekend anniversary of the time the testing  
15 commenced. So hopefully, we will have a report at that point  
16 in time, and that can be given to the defense.

17 THE COURT: You were also checking into  
18 whether the materials were what they purported to be, as  
19 regards the lab audit materials, and also whether the STR  
20 tables were already disclosed as part of that, and I think  
21 that was the other remaining aspects of Sorensen.

22 On Sorensen, Mr. Hammond, is it correct  
23 that a defense expert is up there and observing? Are you not  
24 getting feedback from that person?

25 MR. HAMMOND: It is correct that our

1 consultant was there, but nothing by way of analysis of the  
2 additional swabbing and the creation of the additional  
3 extracts -- nothing by way of analysis was communicated to  
4 us. So all we know is that additional testing was done.

5 We observed that being done, but now we  
6 have no idea what they have done since then. Presumably,  
7 they are going to determine whether there are profiles  
8 sufficient for comparison purposes. That shouldn't take  
9 another week.

10 My bet is that somebody at Sorensen today  
11 knows the answer with respect to whether they were able to  
12 obtain sufficient DNA to make any other observations about  
13 the presence of a testable profile or a comparable profile,  
14 and we don't know that.

15 THE COURT: I suspect that is probably the  
16 case, also.

17 Could we have somebody from the State's  
18 investigation team check that out to see if there is  
19 something that may merit additional testing?

20 MR. BUTNER: So do you want me to get in touch  
21 with the Sorensen Lab and find out where they are in regard  
22 to that additional testing?

23 THE COURT: Not you personally, but I see  
24 Mr. Paupore is doing that with Mr. Sechez.

25 MR. BUTNER: You know what, Judge? I am the

1     guy that keeps getting hung out in front of the judge and  
2     having to explain this. I prefer to be the guy that calls  
3     Sorensen lab. I'm the guy that talked to them last time --

4             THE COURT: I don't have any problem with you  
5     doing that.

6             MR. BUTNER: -- and filed that notice.

7             I am going to do it, then. I'll call  
8     them during the lunch break and ask about these items and  
9     where they're at in terms of the testing, and I'll come back  
10    after lunch and provide a progress report, so to speak, as to  
11    where the testing is.

12            I would point out to Court and counsel  
13    that their expert was there for the first part of the  
14    testing, certainly had the right to remain there while all of  
15    this was going and could give them a report step by step or  
16    blow by blow.

17            But I will call Sorensen and try and get  
18    ahold of whomever is running that stuff and let me know what  
19    is going on, and then I will pass that information on to  
20    Court and counsel.

21            THE COURT: Thank you.

22            MR. HAMMOND: Thank you, Your Honor. When  
23    Counsel contacts Sorensen -- let me just wait until  
24    Mr. Butner's attention is turned back.

25            MR. BUTNER: My attention is perfectly

1 directed. Thank you, Sir.

2 MR. HAMMOND: When Mr. Butner contacts the  
3 Sorensen Lab, I think if he asks them directly about the  
4 process, he will find that our consultant stayed for as long  
5 as there was anything for her to observe. The work that has  
6 to be done between the final swabbing and extraction is not  
7 work that is done where a consultant just sits and watches  
8 it. I could go into details, but I don't think it would  
9 serve us to do so.

10 THE COURT: I agree with that.

11 MR. HAMMOND: But I do think that when he gets  
12 a progress report, he will find out what was done after our  
13 consultant left and why it didn't make sense for them to  
14 invite her to stay nor for her to stay past the three days  
15 that she was there.

16 THE COURT: All right. Thank you both.

17 MR. BUTNER: Judge, you asked about the audit  
18 information. Okay?

19 THE COURT: Yes.

20 MR. BUTNER: D.P.S. audit materials were  
21 provided in the disclosure of January 29 of 2010, under the  
22 46th supplement Bates Nos. 17323 through 17340.

23 In that same supplemental disclosure, an  
24 "N" -- I don't know what this stands for -- NRCL -- you don't  
25 know? Okay. An NRCL full assessment report, which I have

1 been told assessment is -- equates to audit. The first one I  
2 mentioned, there was one dated March the 2nd of 2009, at  
3 those Bates numbers. The second one was dated November 7 of  
4 2008, disclosed in that same supplement, including a  
5 corrective action request, and that is Bates Nos. 17270  
6 through 17322.

7 The scope of accreditation was disclosed  
8 dated March the 5th of 2009, in that same supplement, Bates  
9 No. 17342; an accreditation certificate dated March the 5th  
10 of 2009 was also disclosed in that supplement, Bates  
11 No. 17341.

12 Since that time, I got in touch with the  
13 lab personally and obtained a bunch of additional audits,  
14 going back approximately five years to 2004, and I disclosed  
15 those yesterday in e-mails to Ms. Chapman, and we did a  
16 formal disclosure last night to identify those things. So we  
17 provided them with the five years of audits, so to speak,  
18 yesterday, on top of these previous audit/assessments that  
19 have been disclosed.

20 And just to make the record clear, the  
21 way that the lab is audited, apparently, is it has a full  
22 audit done by an external lab every five years, which is what  
23 was disclosed back in January. And then on alternating  
24 years, in between those five years of audits, they do an  
25 internal audit one year and then they do an external audit

1 the next year, and those audits were disclosed as of  
2 yesterday, Judge. So I think we've got all of the audits  
3 that we need to disclose now.

4 THE COURT: STR table materials was another  
5 issue that was left.

6 MR. BUTNER: That was previously disclosed, to  
7 my understanding. I don't have that specified at this point  
8 in time.

9 But I disclosed two types of STR tables  
10 yesterday, one of which is in a publication, and I e-mailed  
11 that to Ms. Chapman, and the other of which was in the form  
12 of information provided to us from the lab by Kortney Snider,  
13 and that was disclosed in the January -- no, not in that  
14 form.

15 In any event, we have a Bates number of  
16 20734 that discloses STR. I believe these are STR tables.  
17 They call them "allelic frequency tables." I think that that  
18 is a synonymous term, but I -- I'm not of a sufficient  
19 scientific acumen to state that with certainty for the  
20 record.

21 THE COURT: Thank you.

22 Does that address, either Ms. Chapman or  
23 Mr. Hammond, the issues that you were concerned about last  
24 week?

25 MR. HAMMOND: Well, I think it may address the

1 question of do we now have them. We will have to go through  
2 them.

3 He did send counsel -- Mr. Butner sent us  
4 six e-mails yesterday to which audits were attached. He did  
5 send us what is called an allelic frequency table which -- if  
6 that is what they have, that corresponds to our STR frequency  
7 request. We will look at those to determine whether they are  
8 responsive, but I expect they are.

9 What it doesn't deal with is our  
10 expression of concern about the fact that it took us this  
11 long to get things that we know they have and that they have  
12 had for at least the last decade of the D.P.S. has had this  
13 audit process. They couldn't maintain their accreditation  
14 without it. We asked for it, and this Court ordered it, and  
15 yet now we are getting them only after considerable whining  
16 on a day a month before trial.

17 It puts us, as has been the case  
18 throughout, in a very difficult position. We now have to,  
19 with the aid of our consultants, analyze that. We still have  
20 not interviewed the D.P.S. personnel. But if this is the  
21 final work, then we will move as quickly as possible to  
22 interview those people.

23 But it does seem to us, Your Honor, that  
24 at some point there needs to be some sanction for the late  
25 disclosure. And I know we are going to talk at some point in

1 the next day or so about the question of sanctions for late  
2 disclosure or nondisclosure, and so I would like to defer  
3 that part of it until we get there.

4 And I will accept that what Mr. Butner  
5 sent us yesterday will comply with the outstanding request,  
6 and we will advise the Court if it doesn't.

7 THE COURT: Mr. Butner.

8 MR. BUTNER: Just to clarify, Judge, the main  
9 external audit that we've really been discussing about this  
10 so called NRCL final assessment report and accompanying  
11 documents, that was disclosed in January of this year, Judge.  
12 I scrambled and got the -- there is a manager of quality  
13 control or something, and I got ahold of him, and I got those  
14 additional internal audits of the interim years and so forth  
15 to be provided, also -- as I stated I would do in court.

16 But the main audit for this lab with its  
17 certification, et cetera, and with its requests for certain  
18 corrective action being made -- all of that was disclosed in  
19 January.

20 I would also like to note that there was  
21 actually a seventh e-mail sent, and I believe it was  
22 received, and that e-mail also had STR tables. Just to  
23 clarify for Counsel, that was a forwarding on of those STR  
24 tables from Becky Love-Holt, a lab -- an analyst. I thought  
25 so. Ms. Chapman indicated that she actually did receive that

1 e-mail, too. So we've got -- I think we've got the STR  
2 tables thing handled. Thank you.

3 THE COURT: Thank you.

4 Defense filed a motion March 22nd to  
5 compel interview of -- in particular of victim Ruth Kennedy,  
6 who is a listed witness. Let's move on to that one. I --  
7 maybe we shouldn't move on to that until I have given  
8 everybody a chance to take a brief recess. Let me hold that  
9 for a few minutes.

10 We will take a recess.

11 (Brief recess.)

12 THE COURT: The record reflects the defendant  
13 is present with all his counsel and both prosecutors here, as  
14 well.

15 Unless you have an alternative, I think  
16 we'll move on to the Ruth Kennedy matter.

17 MR. HAMMOND: Thank you, Your Honor. We would  
18 like to address the Ruth Kennedy motion at this time.

19 We have filed this motion seeking to  
20 compel her interview, for reasons that we hope are well  
21 spelled out in our papers. She is a critical witness in this  
22 case. I don't think that the State has any objection to the  
23 idea that she is an important fact witness as well as a  
24 witness who might testify at some later stage, if we ever got  
25 there.

1                   But -- so we have in her case this  
2 situation that does sometimes arise in which someone is  
3 entitled statutorily to what appears to be the broad scope of  
4 the victim's rights statute and the need to weigh that  
5 against the defendant's constitutional right to  
6 confrontation, to counsel, and to be able to develop a  
7 defense. To us, the tension here is really best typified by  
8 the United States Supreme Court decision in *Chambers v.*  
9 *Mississippi*. That case, which has now been cited as much as  
10 any case in recent American history by the Supreme Court,  
11 stands for the proposition that in some cases there is a need  
12 to balance the rules that govern State court trials against  
13 federal constitutional rights of the defense, and we believe  
14 that this is one of those cases where there is a collision  
15 between the constitutionl right of the defendant to  
16 representation by counsel and to the ability to build and  
17 have a defense in the capital arena.

18                   So we have laid that out, we have  
19 suggested that there are certainly ways that the interview  
20 can be conducted so that it will be done as respectfully as  
21 possible, so that her status as a victim will be regarded.  
22 But to say that we may not speak to her at all we think is an  
23 interference with the right of counsel and the right of this  
24 man to a defense.

25                   We also have addressed the narrower

1 question of whether she is a victim of the burglary charge in  
2 this case. As the Court very well knows, the State has  
3 charged both an aggravated burglary and the first degree  
4 murder. She is not, under that statute, a victim of the  
5 first crime charged.

6 And at the very least, we think that the  
7 case that we have cited, the *Chamblin* case -- if that's how  
8 it's pronounced -- does acknowledge that if you are not a  
9 victim of one crime charged, your victim status as to another  
10 crime would not prevent an interview. And we understand that  
11 the facts of that case are different, that this is a  
12 situation in which the facts of one charge are close to the  
13 facts of another.

14 But nonetheless, in recognition of the  
15 importance of the constitutional rights involved, we have  
16 asked that the Court balance the statutory provision on the  
17 right of victims, which technically, at least, does not apply  
18 to the burglary charge, and acknowledge that an interview  
19 would serve the interest of justice in this case.

20 And I want to end by saying that we have  
21 done everything that we can do. Under the rules that bind  
22 us, we have attempted to contact her, as the rules require.  
23 We sent a letter to Mr. Butner, to the State. We have never  
24 received a response in writing, but we have received an oral  
25 response that the State claims that Mr. Butner did ask her if

1 she would be willing to talk to us, and she has declined.

2           Given that this is a death penalty case  
3 and that her views on the death penalty are important for a  
4 host of reasons that I think are obvious to us all, we would  
5 ask that the Court order that we have an opportunity to  
6 interview her. Thank you.

7           THE COURT: Mr. Butner, I have read the  
8 response. Anything else that you would like to add?

9           MR. BUTNER: Judge, I guess the thing that  
10 jumps out and is clearly conveniently ignored by the defense  
11 in asking for this interview, both orally and then written  
12 and then by way of motion, now, is Section 2.1 under the  
13 Constitution of the State of Arizona, setting forth the  
14 Victim Bill of Rights, and specifically Provision No. 5,  
15 which states that the victim of a crime has a right to refuse  
16 an interview, deposition, or other discovery request by the  
17 defendant, the defendant's attorney, or other person acting  
18 on behalf of the defendant.

19           And clearly, the Victim's Rights Statute,  
20 13-4401, provides that when the victim of a crime is killed,  
21 that a family member then becomes the victim, and Ruth  
22 Kennedy is one of those defined family members, so to speak,  
23 under the Victim's Right Statute. She is certainly a victim  
24 in every respect of the word, as defined by the Arizona  
25 Constitution and statute in regard to both the burglary

1 offense and the homicide offense in this case.

2 And so that's the basis for the State  
3 asking that this 85-year-old lady, who has been repeatedly  
4 asked about being interviewed, be allowed to decline this  
5 interview. And to clarify how that was done, I did not  
6 interview Ms. Kennedy. I spoke with her in a telephonic  
7 conversation a couple of times about this. And in one of  
8 them, she asked me to read to her the defense letter  
9 requesting an interview, and I did that in the first  
10 conversation. And then we had another conversation months  
11 later, and I asked her again about it, and she asked that she  
12 not be required to be interviewed at that time, also.

13 So I think there is ample statutory and  
14 constitutional authority, not to mention the rules of  
15 humanity to allow her to refuse to be interviewed in  
16 connection with this case.

17 Thank you, Judge.

18 THE COURT: So I am clear and the record is  
19 clear, the oral request for an interview, you posed to  
20 Ms. Kennedy, received an answer from her declining to be  
21 interviewed by the defense. When you got the letter, you  
22 sent it back and read it to her over the phone?

23 MR. BUTNER: That's correct. I did both.

24 THE COURT: You got a response back from her  
25 declining -- or expressing a desire not to be interviewed.

1 MR. BUTNER: Exactly. And then I spoke with  
2 her again in a subsequent telephone conversation and asked  
3 her what her wishes were in regard to whether she wished to  
4 be interviewed, and she again indicated that she really  
5 wished that she did not have to submit to such an interview.

6 THE COURT: She is, however, still a  
7 prospective witness for the prosecution in the case.

8 MR. BUTNER: Yes, she is, Judge.

9 THE COURT: Mr. Hammond.

10 MR. HAMMOND: Your Honor, it was the -- one of  
11 the things that led us to feel strongly about this was one of  
12 the first interviews that Miss Kennedy gave, which we do have  
13 a record of, in which, I think it is fair to say, her  
14 response to questions about being further interviewed and her  
15 views on the death penalty were at best ambiguous. She was,  
16 I think at that point, much more of an open mind, at least of  
17 a mind to cooperate with both sides in this case.

18 THE COURT: This was a YCSO interview?

19 MR. HAMMOND: It was.

20 THE COURT: That was audio taped early on, but  
21 the quality of the audio tape, you indicated, was poor.

22 MR. HAMMOND: Right. The quality was poor,  
23 but it did cause us to believe that it was important for us  
24 to continue to pursue this issue.

25 And I have nothing further to say in

1 response to the State.

2 THE COURT: I recognize the defendant's rights  
3 with regard to presenting a defense and trying to determine  
4 ahead of time discovery through the discovery and disclosure  
5 process what a witness will testify to. I don't find that  
6 the defendant's rights under the Sixth Amendment are any less  
7 preserved by the passage of the Arizona constitutional  
8 provisions having to do with the victim's rights. And I  
9 don't find that it is appropriate under the statutes  
10 implementing the Victim's Bill of Rights constitutional  
11 provision to order the compelled interview of Ruth Kennedy in  
12 this case. I don't think that that results in any loss of  
13 the defendant's Sixth Amendment rights or due process or  
14 confrontation rights.

15 I am going to deny the request to order  
16 Mrs. Kennedy to submit to an interview.

17 What other issues are more on the top of  
18 the list of the many that we have to go through?

19 MR. SEARS: Judge, not so much because this is  
20 on the top of the list, but because we thought it was  
21 something we could deal with, perhaps, before the noon break  
22 here, when it looks like both sides have a lot of outside  
23 business to do.

24 I would like, with your permission, to  
25 take up our March 10, 2010 motion to compel the State to make

1 a proper proffer and preclude witnesses.

2 THE COURT: Let me keep track of what I am  
3 doing.

4 All right. Mr. Sears, you may proceed.

5 MR. SEARS: Judge, this motion grew out of a  
6 reply that we filed on February 17th of this year in regard  
7 to a motion we had filed to preclude two of the State's  
8 witnesses, about whose expert status they are still  
9 continuing to debate, from testifying. And what we did in  
10 that reply is identify a list of witnesses that, based on the  
11 disclosure received to that point, we knew either nothing  
12 about and couldn't understand why they were on the State's  
13 witness list, or from what little we did know about them,  
14 appeared to us to have nothing admissible to say.

15 And the reason this became a problem is  
16 this ongoing problem caused by the State's unwillingness to  
17 reasonably rewrite its witness list. When we filed this  
18 motion, the State was still listing 142 witnesses and they  
19 were up to 22 experts. And those numbers have shifted  
20 somewhat but not greatly. In fact, as you will hear later,  
21 the number of new experts, particularly new experts for whom  
22 we have no reports or other information, has grown in the  
23 very recent past.

24 So what we did is take out of this list  
25 of witnesses a group of -- I think it was originally 27

1 witnesses that we just didn't understand the basis for their  
2 inclusion in the State's witness list. And you will remember  
3 that we have had many discussions, and you have issued orders  
4 directing the State, first in a cordial and friendly way, to  
5 make a real effort at reducing their witness list, and then  
6 as time went on and our request became more urgent and in a  
7 more direct way, directing the State to do that. And for  
8 whatever reason, the State really has not done that.

9                   There is another motion we have filed  
10 dealing with an instance in which we actually conducted  
11 defense interviews of witnesses who clearly, during those  
12 brief interview, had nothing relevant or admissible to say in  
13 this case, and we have a motion for sanctions dealing with  
14 that. So what we were trying to then and what we are trying  
15 to do now is to avoid the need to investigate and interview  
16 and work on witnesses that we can't understand why the State  
17 would think they could or should call.

18                   And in their response, rather than really  
19 get down and do the work necessary to show the Court why  
20 these witnesses could or should be called, the State chose,  
21 for the first time, to attack us and to say that we hadn't  
22 provided proffers and that we hadn't done disclosures, we  
23 hadn't disclosed recorded defense interviews and a whole  
24 laundry list of things that they had never, until last month,  
25 raised any complaint about. And we found that disheartening,

1 because we really hoped that the State would zero in and do  
2 the work necessary to do. You'll remember that on March 2,  
3 we actually were going to have these proffers done in court,  
4 we ran out of time, the State offered to do them in writing.  
5 They did. We have told you about this two-and-a-half page  
6 e-mail that we got from the State several days later that has  
7 this information.

8                   And the proffers, many of which we have  
9 quoted either in part or in whole to you in our reply, just  
10 don't answer the question. We had in mind a real proffer, as  
11 defined in *Livermore* and *Udall* and the other learned  
12 treatises about evidence, that would provide us and  
13 ultimately the Court with a real understanding of what  
14 relevant admissible evidence these witnesses might have to  
15 offer at the trial in this matter. Instead, the State  
16 continues to use shorthand and other cryptic comments for  
17 witnesses and then provides some confusing and contradictory  
18 comments about people not being a witness, and then the word  
19 "rebuttal" in these limited proffers further confuses the  
20 situation.

21                   So what we ask you to do is give them one  
22 last opportunity to make a proper proffer for a handful of  
23 witnesses -- David Soule, I believe his name, who was  
24 identified as a boyfriend of the victim in this case; Debbie  
25 Hill, a friend; Debbie Kasprzak, who we think works for Rocky

1 Mountain Information Network; Jeff Zyche and a person named  
2 Deane Shank -- or have those witnesses precluded. And we  
3 would ask that the Court make it clear to the State that the  
4 proffer has to be meaningful. It has to provide some  
5 reasonable basis on which the State makes the claim that  
6 these people could and should be State's witnesses against  
7 Mr. DeMocker.

8 And then disclose a real witness list in  
9 compliance with Rule 15.1, so that we don't continue to waste  
10 our time and the Court's time going through this list and  
11 trying to guess why and who the State intends to call.

12 And then finally, enter an order right  
13 now precluding the long list of people that are in our reply,  
14 for the reasons that we've stated in both the motion and the  
15 reply, for failure to provide any relevant or admissible  
16 evidence or any proffer of that evidence that would support  
17 those people being a witness. This is simply to allow us in  
18 the few remaining days before trial to use our limited  
19 resources efficiently, so that we are not chasing after  
20 people again simply because they are on the State's witness  
21 list, when either the State knows or should know that those  
22 people cannot be trial witnesses in this case.

23 That's all we're asking. That's all we  
24 asked before. We thought that the proffer process was a  
25 reasonable way to resolve this between the sides in this case

1 but, unfortunately, it just exacerbated the problem, so here  
2 we are asking you to make these decisions that we are unable  
3 to work out between the two of us. It is unfortunate, but  
4 that is where we are.

5 I would point out, just parenthetically,  
6 that the complaints about our disclosure are really  
7 interesting. First, when we filed our reply, the State was  
8 at the 51st supplemental disclosure. I may have mentioned a  
9 number, but we got the 58th supplemental disclosure delivered  
10 to my office after hours last night.

11 And we are filing motions regarding  
12 those, but we can't file the motions fast enough to keep up  
13 with these new disclosures. So you can expect, Your Honor,  
14 motions seeking to preclude -- now we're up to 55, 56, 57,  
15 and 58, probably, in the next round, depending on what these  
16 disclosures turn out to be. But it just points out the  
17 problem of trying to honestly understand what the State's  
18 case is and who their witnesses are and what their evidence  
19 is when they neither explain the basis for the people they  
20 have listed and keep adding, on almost a daily basis now, new  
21 witnesses and new exhibits and new evidence, sending us off  
22 on yet another chase to understand this late-disclosed  
23 evidence.

24 So these problems all interlock. I mean,  
25 it's very difficult for us, and it must be difficult for the

1 Court to try and understand the discreet issues that each of  
2 these motions raise, because they do seem to relate to each  
3 other.

4 The problem is pretty simple. It looks  
5 to us like, notwithstanding this Court's prior orders  
6 regarding discovery cutoffs, that sometime about the end of  
7 January or first of February this year, some sort of decision  
8 was made inside the prosecution that work that was either in  
9 progress or had never been done or never been started in the  
10 months and months before that needed to be done. And so  
11 there has been this mad dash to the finish line from February  
12 that goes on today to pull all of these things together.

13 And not only do we not understand who  
14 their witnesses were as of February, as you will see and as  
15 you will hear, we are at a loss to understand how to respond  
16 to and what we are supposed to do with this dump of discovery  
17 witnesses and exhibits and new information that comes in at  
18 breakneck pace. You will hear that one of the disclosures --  
19 it might be the 55th or 56th, I think -- I can't keep up with  
20 it -- contains something like 60,000 e-mails on five  
21 different CDs. And so at the end, our fundamental complaint  
22 will be much the same in each of these motions.

23 But as to these people, we just tried to  
24 identify the people that we can't see any reason to go  
25 forward with. The Court offered and we offered the State an

1 opportunity to explain why these people would be or clearly  
2 and unequivocally communicate that these people are not  
3 witnesses and they're not on the witness list and they're not  
4 going to call them, and we got a response from them that we  
5 just can't interpret. Thank you.

6 THE COURT: Mr. Butner.

7 MR. BUTNER: Judge, I am going to remain  
8 seated, if you don't mind --

9 THE COURT: That's fine. I don't mind.

10 MR. BUTNER: -- because I am looking at the  
11 written proffer that was provided to the defense.

12 And the proffer basically consisted of  
13 identification of each of the Yavapai County Sheriff's Office  
14 supplements and then a short summary of what the witness  
15 would be called to testify about in the event they were  
16 called to testify. And in a number of these instances,  
17 they're rebuttal witnesses, so we're not sure that they would  
18 ever be called to testify. If they are rebuttal witnesses,  
19 it is really hard to know specifically what they are going to  
20 rebut, until you hear what it is that the defense witnesses  
21 would have to say in that regard. Hence, the pointing out to  
22 the defense that, you know, their disclosure has not been  
23 voluminous or ongoing in this case, up-to-date.

24 But to give you an example, speaking  
25 about David Soule. David Soule is a boyfriend of, or was a

1 boyfriend of, Carol Kennedy's -- very close to her but living  
2 in a different state. He is referenced in Yavapai County  
3 Sheriff's Office Supplements No. 25, 27, 28, 34, 42, 44, 52,  
4 57, 84, and 119. And basically, all of the information that  
5 Mr. Soule knows in connection with this case is set forth in  
6 those supplements.

7                   In the little statement about what  
8 Mr. Soule would testify about, I indicate that he is the  
9 victim's boyfriend, that a DNA swab was obtained and tested,  
10 he is a rebuttal witness, and he does not live in Arizona.

11                   Going on, reference Debbie Hill. Debbie  
12 Hill is referenced in Yavapai County Sheriff's Office  
13 Supplements 51 and 94. She is a close friend of the victim  
14 but lives at a distance. And she is a mitigation rebuttal  
15 witness. She would not be called in the State's case in  
16 chief.

17                   In regard to Sally Butler, who is one of  
18 the people -- she was actually interviewed by the defense,  
19 and she is referenced in Supplements 25, 27, -- actually, 25  
20 through 27, 37 -- 34, 40 through 42, 44, 52, 81, 94. The  
21 proffer goes on describing how she is familiar with the  
22 victim's habits. She is a close friend. The defense has  
23 already interviewed her. She has known the defendant and the  
24 victim. Known the defendant since they were 17 years of age.  
25 Met at Prescott College. It goes on and on about her.

1                   In regard to Jeff Zyche, Jeff Zyche has a  
2 very small bit of information in this case. He was  
3 referenced in Yavapai County Sheriff's Office Supplement  
4 No. 27. A DNA swab was obtained from him and is being  
5 tested. His really sole attachment to this case, if you  
6 will, is that a piece of paper was found in the open  
7 rangeland behind the victim's house, and it was an auto  
8 repair paper, and it had blown off of Mr. Zyche's trash. And  
9 so we followed up on that and wanted to know what the heck  
10 that was doing out there, Mr. Zyche. And we ultimately  
11 ascertained that, basically, it had somehow blown off of his  
12 trash, and he basically had nothing else to do with this  
13 case.

14                   Deane Shank. Deane Shanks, he's been  
15 interviewed. His reference to this case is set forth in  
16 Yavapai County Sheriff's Office Supplements 108 and 119. All  
17 of this was provided to the defense. A DNA swab was obtained  
18 and tested. He is a spiritual teacher for the victim in this  
19 case. He's offered as a rebuttal, not a witness.

20                   Debbie Kasprzak in this case -- and I  
21 must confess, I did not make any proffer regarding Debbie  
22 Kasprzak. She was not on the list of people that I wrote  
23 down when we were in court. But she is part of RMIN. She  
24 has worked closely with Mr. Echols. She is basically an  
25 assistant of Mr. Echols, in this case. And I'm not sure that

1 she's ever going to be called to testify. If she were called  
2 to testify, it would, in essence, be in connection with the  
3 preparation of some charts and diagrams and things of that  
4 nature that would assist Mr. Echols or a time line that would  
5 assist the State's presentation of evidence in this case.

6 So in regard to those people that are  
7 mentioned on the first page of their motion, that is the  
8 extent of the proffer, but I must confess that most of the  
9 proffer is made in Yavapai County Sheriff's Office  
10 supplements.

11 Now, in regard to those mentioned  
12 thereafter, I've already described Sally Butler. Jana  
13 Johnson is specifically described in a Yavapai County  
14 Sheriff's Office supplement as -- I referred to her as the  
15 lady saw the bicycle rider, and that's basically it. She saw  
16 a bicycle rider around 630 p.m. on July the 2nd.

17 Dr. Diane Cornsweet, she was the victim's  
18 therapist. She is not going to be a witness in this case,  
19 but she was referenced in Yavapai County Sheriff's Office  
20 Supplements 10, 27, and 53.

21 Cody -- I hope I say this right --  
22 Buchser. I believe she is a real estate agent for the  
23 defendant, provided real estate maps to the defendant. She  
24 wouldn't be a witness in terms of the State's case in chief,  
25 but she might end up being a witness in that regard. And we

1 really don't know a whole lot more about her, but she's, as I  
2 stated, referenced in Yavapai County Sheriff's Office  
3 Supplement 87 as to her connection with this case.

4 Nikki Check. Nikki Check is a friend of  
5 Carol Kennedy's. She is familiar with Carol Kennedy's daily  
6 routine. She had spoken on the phone with Carol Kennedy on  
7 July the 2nd of the year 2008. She is familiar with Carol's  
8 daily run and that the doors at Carol Kennedy's residence on  
9 Bridle Path were not locked. That is all set forth in the  
10 proffer, and it is referenced, also, to Yavapai County  
11 Sheriff's Office Supplement No. 64.

12 THE COURT: So like Buchser, are you calling  
13 her or not calling her?

14 MR. BUTNER: No. I don't think we are going  
15 to be calling her, Judge.

16 Sean Bailey and Morgan Jay. Those are  
17 witnesses the DNA swabs were obtained from and have been  
18 tested, as a matter of fact, and they are not witnesses.  
19 They were specified in YCSO Supplements 93, and then 48, 76,  
20 126.

21 I can go on with every one of these  
22 witnesses in the same fashion.

23 THE COURT: I guess the question is -- and no  
24 offense intended to either side -- but if they are witnesses  
25 that you have listed in the past, that you have a 99 percent

1 idea are not going to be called -- I mean, should there be a  
2 time that I have you submit whatever redacted list you have  
3 so that -- from both sides -- so that the other side knows  
4 who you are not going to call and won't be spinning their  
5 wheels?

6 MR. BUTNER: I can understand that, Judge, and  
7 yes, for the most part, that is the correct. But sometimes  
8 there are things come up that are minor alterations. And  
9 I've already done that. I submitted a list to Mr. Sears  
10 months ago, basically, saying these people are likely to be  
11 witnesses, these people are not going to be witnesses. Since  
12 that time, I think there have been --

13 THE COURT: And then there is some gray-area  
14 witnesses --

15 MR. BUTNER: Exactly.

16 THE COURT: -- depending on what comes out of  
17 the other side.

18 MR. BUTNER: Exactly. And that was done  
19 months ago. And, I mean, I am looking at that list right  
20 now. You know, it wasn't done in a formal fashion. It was  
21 done by way of e-mail, but I know John got it, and we have  
22 talked about it from time to time. If I could -- I'm looking  
23 through it just to give you an idea.

24 At that point, I thought Cornsweet was  
25 going be a witness. I have sense since clearly indicated

1 that she isn't going to be.

2 I thought at one point that Buchser was  
3 going to be a witness -- and maybe I'm saying her name  
4 terribly wrong. I don't think she is going to be a witness  
5 now.

6 But there are very few changes on this  
7 list. Let me see if I can find -- to be honest with you,  
8 Judge, I was concerned with -- for example, some witnesses  
9 like Sean Bailey and Morgan Jay, is there going to be some  
10 sort of a DNA attack or something like that, in which case  
11 they would be important witnesses, because they weren't  
12 around. But the possibility of their DNA could have ended up  
13 on the victim's fingernails. I don't think they are going to  
14 be a witness now. That is the kind of thing that I am  
15 dealing with. And the proffer, in essence, addresses those  
16 things.

17 For example, Debbie Sims and Terry Sims,  
18 they're very minor witnesses, but they will be able to  
19 testify that the defendant was not at the Hassayampa Fitness  
20 Center on the night of the homicide. You know, that's all  
21 that they have to say. They weren't referenced in a YCSO  
22 supplemental DR.

23 And same thing with Mike Bueler. It  
24 just -- basically, he would testify that the defendant was  
25 enrolled in Great Expectations, the Internet dating service,

1 as I understand it, and he is a rebuttal witness.

2 THE COURT: Rebuttal of mitigation or rebuttal  
3 of case in chief?

4 MR. BUTNER: Mitigation.

5 Similarly with Dr. Markham and  
6 Dr. Wineberg. If there is some sort of testimony that  
7 somehow the victim would have had contact with them on the  
8 day of her death, they can be called in rebuttal. She  
9 didn't. And they weren't working there at that point in  
10 time.

11 Dr. Ruben, again, he's referenced in YCSO  
12 supplements, and he is a rebuttal witness.

13 Don Wood is specified in three Yavapai  
14 County Sheriff's Office DRs about the nature of his  
15 testimony, and I set forth what I believe his testimony will  
16 be. Steven DeMocker said to him, basically, by way of  
17 e-mail, that he was duped by Carol into believing that she  
18 feared for her life.

19 THE COURT: Does that conclude?

20 MR. BUTNER: You know, I think that pretty  
21 much specifies almost everybody. We've indicated to them, to  
22 the defense, the nature of the other witnesses.

23 THE COURT: Mr. Sears.

24 MR. SEARS: You know, in some way, the State's  
25 response today is a pretty clear illustration of the

1 continuing problem we have. And we heard your comments just  
2 now in the same way. Isn't it time, and can it be the time  
3 soon when the State will produce a real witness list and be  
4 able to defend the reason why each of those witnesses is  
5 going to be called in the most simple terms. And doing that  
6 on the fly here in court and listening to Mr. Butner say  
7 maybe not this one, maybe not that one, just points out the  
8 problem.

9 We're trying to investigate their case  
10 from the disclosure they gave us, telling us where these  
11 people make statements that appear in disclosures is, in our  
12 view, not a proffer. We have that information. We  
13 understand where these people came from.

14 For example, Mr. Soule, the boyfriend,  
15 wanted to say terrible things about Mr. DeMocker that he  
16 heard from Ms. Kennedy. That is in the police reports. We  
17 can't imagine for the life of us that the State would believe  
18 that it could or should try to offer that evidence through  
19 Mr. Soule. So absent that, our request simply was what is it  
20 that he could say in this case that would be relevant or  
21 admissible and in which part of the case are you proposing to  
22 call him.

23 Rule 15.1(I), which is the additional  
24 disclosure in a capital case, talks about penalty or  
25 mitigation rebuttal disclosures by aggravator in this case.

1 The State has never done that. They simply list, you know,  
2 police supplement after police supplement, and they say  
3 somewhere in there is the evidence that these people may say.

4 I would disagree with the State's  
5 position. I think the State has an obligation and should  
6 know going in what the rebuttal witnesses are going to rebut.  
7 They may not know the precise statements, but they will know  
8 the subject matter, at least, that a rebuttal witness will be  
9 called to rebut.

10 For example, Cody Anne Buchser, who is a  
11 realtor in this case. There was a suggestion early on in the  
12 disclosure that perhaps Mr. DeMocker was somehow secretly  
13 planning to get control of the Bridle Path residence from  
14 Carol Kennedy. In fact, the disclosure actually shows that  
15 it was a suggestion made during the divorce negotiations  
16 where she was complaining about her inability to keep up with  
17 the payments, and Mr. DeMocker proposed, through counsel,  
18 that if that was a problem, perhaps he would take it off her  
19 hands and he could try to make the payments.

20 And she was a realtor that had looked for  
21 properties for Mr. DeMocker before, and there was some  
22 suggestion in disclosure that perhaps Mr. DeMocker, in some  
23 sinister way, was looking for properties near Bridle Path. I  
24 don't think the State has any information from her that would  
25 be relevant or admissible. And if she were a rebuttal

1 witness, the State has to have some idea today what it is  
2 that would be said at a penalty phase in this case to which  
3 she would offer rebuttal. What it is that she could possibly  
4 say. Otherwise, she is just a witness that's out there, and  
5 we interview her, and she says "I don't know why I am a  
6 witness."

7 To be clear, we started this process from  
8 a handwritten list that Mr. Butner is talking about today  
9 they have, where they put initials by the names of witnesses  
10 on their witness list, which basically didn't exclude very  
11 many people at all. We took that list and then looked at it  
12 carefully and said, okay, we understand where you are today.  
13 At least as to these 27 people, we can't think of a single  
14 reason why these people would be prosecution witnesses, help  
15 us out here. And we are still in that same position.

16 So if we were to look at these today, do  
17 we need to interview David Soule? Do we need to interview  
18 Cody Anne Buchser? Do we need to interview Carol Tidmaret?  
19 Do we need to interview Dr. Markham? Any of these people?  
20 It's not clear.

21 The proffer process was a way in which  
22 the State could have made that clear, because part of the  
23 proffer could have been a simple declaration of the State  
24 saying upon further reflection, this person will not be a  
25 witness, and we take the red pen out, and that person would

1 not be the subject of any further investigation.

2 MR. SEARS: I will give an example. The State  
3 has disclosed a man named Rod Englert. There are several  
4 motions dealing with Mr. Englert. Mr. Englert is disclosed  
5 as an expert on crime scene and blood spatter. And he has  
6 prepared a report, which was disclosed to us in September of  
7 2009. We've had some discussions with the State about him.

8 When we contacted Mr. Englert in the last  
9 few days, he told us that he was shocked that he was on the  
10 State's witness list, that he didn't write the report, an  
11 associate wrote it. He simply signed off on it, that he had  
12 never seen any evidence, he had never visited the scene. He  
13 had been asked to express opinions on evidence based on  
14 photographs and police reports, and was told that his  
15 services were no longer required for budgetary reasons in  
16 September.

17 We had been asking the State repeatedly  
18 day after day, are you going to call Rod Englert? Is he a  
19 witness? What are you going to do about that? And we were  
20 told, you contact him. He is on our list. He is a witness.  
21 That is the information we have today about Mr. Rod Englert.

22 We are a month from trial. Somehow,  
23 someplace there has to be an answer. We tried to get the  
24 State to do it. I think the Court tried its very best to get  
25 the State to do it. Now it is time to just take the judicial

1 red pen out and say, as to these people, there is nothing  
2 that the State has presented that is even close to the  
3 sufficient proffer that would justify these people being on  
4 the witness list. These people are precluded.

5 MR. BUTNER: If I might, Judge. Something new  
6 just came up.

7 THE COURT: I want to hear back from you,  
8 Mr. Butner.

9 MR. BUTNER: Right.

10 Concerning Mr. Englert, first of all, he  
11 has provided a written report as to what he would testify  
12 about. That was disclosed to the defense.

13 Secondly, it is not mentioned -- he is  
14 not mentioned in any of these about a proper proffer, so to  
15 speak. He is an entirely new witness that they bring up out  
16 of the blue.

17 Thirdly, we have had discussions on-going  
18 about how we were going to arrange for Mr. Englert's  
19 interview. And the defense continually requested, well, how  
20 about you pay for the interviews of your witnesses, and we  
21 will pay for the interviews our witnesses. I was initially  
22 amenable to that, but I had to get authority from my bosses  
23 in order to do that.

24 We then had a problem with another  
25 witness in terms of the way that that payment worked out.

1 They have told me I can't do that. If the defense wants to  
2 interview somebody, they are going to pay that expert witness  
3 to interview them.

4 The defense went around me to contact  
5 Mr. Englert. I was going to set up an interview with  
6 Mr. Englert for the defense. They went around me and then  
7 come up with this stuff out of the blue. I don't think that  
8 is really appropriate or kosher, and it certainly has nothing  
9 to do with a proper proffer in this case.

10 This is another example of the defense  
11 conjuring up disclosure problems when we are attempting to  
12 cooperate with them. I see Mr. Sears smirking again. Judge,  
13 I don't like this kind of litigation. This is a shot in the  
14 dark that was not mentioned in the written motion, and it is  
15 highly improper.

16 THE COURT: Are you calling Mr. Englert?

17 MR. BUTNER: Yes. We are calling him. He was  
18 specified as an expert witness. His opinions were disclosed  
19 months and months ago. And then, I guess, the defense  
20 decided, we will see if we can shoot him out of the water.  
21 We will go behind the prosecutor's back with our investigator  
22 and see if we can do that. And, apparently, that's what they  
23 are trying to do.

24 THE COURT: Are they allowed to contact expert  
25 witnesses on their own?

1 MR. BUTNER: You know, I think they are,  
2 Judge, but as a matter of decorum, we try to help and assist  
3 and set up interviews just as we have done in this case with  
4 one of our experts, so to speak, and are willing to do so  
5 with others.

6 THE COURT: Mr. Sears.

7 MR. SEARS: Your Honor, perhaps Mr. Butner  
8 over the noon recess might wish to talk to Mr. Sechez, his  
9 investigator, who advised us that we should contact  
10 Mr. Englert. That is why we did it. That is the sole  
11 reason. I would be happy to put on Mr. Robertson some day  
12 under oath to tell you that, probably Mr. Sechez to tell you  
13 the same thing.

14 I was not smirking. My back hurts. I  
15 was wincing when I got up. There is nothing funny about  
16 this. Mr. Butner is quite right.

17 But Mr. Englert's situation arose in the  
18 last couple of days. As I said before, we are having trouble  
19 filing motions fast enough to keep up with the circumstances  
20 as they change them. If the Court needs a motion and  
21 Mr. Butner needs a motion, we will file a motion about  
22 Mr. Englert. I am simply reporting to the Court and  
23 Mr. Butner -- and by the way, this isn't a surprise. We sent  
24 Mr. Sechez an interview saying -- an e-mail saying, you might  
25 want to talk to Mr. Butner. Here is what Rod Englert

1 told us about his situation in the case.

2 I point that out because we are chasing  
3 around after their experts, and we finally reach an  
4 agreement -- I don't need to burden the Court with the  
5 dispute about who is going to pay for these. I wish  
6 Mr. Butner had chosen a time other than this morning in court  
7 to announce this change in the policy. I believe we had an  
8 agreement, not just a suggestion, an agreement that the State  
9 would pay for their experts and we would pay for ours.  
10 Apparently that is not true. We will act accordingly.

11 I think the Court is right. There is no  
12 prohibition against us contacting any of the State's  
13 witnesses, who are not victims in this case. But we were  
14 trying not only to observe the customary practice in Yavapai  
15 County, the decorum that Mr. Butner is seeking, but also the  
16 specific suggestion of the County Attorney's own investigator  
17 about how to do it with this witness. That is the truth.

18 THE COURT: Mr. Butner.

19 MR. BUTNER: Judge, I don't see Mr. Englert  
20 mentioned anywhere in this motion, and I don't know what we  
21 are doing standing up here litigating this in front of the  
22 Court. It hasn't been raised by proper motion. If they want  
23 to interview Mr. Englert, we will set up an interview of  
24 Mr. Englert for them.

25 THE COURT: I don't think that is the issue

1 with regard to Mr. Englert. I don't know how we particularly  
2 got off on that tangent, except as Mr. Sears raised it, as  
3 example of one of the issues that may remain in the case  
4 about who the State knows they are going to call versus  
5 somebody that may be in a gray area of who you are going to  
6 call versus an identification of what part of the case they  
7 are going to be called in, the mitigation rebuttal as opposed  
8 to primary case rebuttal. And to observe that 15(i) had  
9 allegedly not been complied with in terms of identifying  
10 rebuttal on the basis of which factor.

11 MR. BUTNER: Judge, the last time Mr. Sears  
12 and I chatted in the courtroom upstairs, he asked me about  
13 Mr. Englert. He asked me if Mr. Englert was still going to  
14 be a witness. I said yes, he is going to be a witness. He  
15 asked me about the interview situation and who was going to  
16 be paying, and I thought that it would be appropriate that we  
17 pay for our experts being interviewed and they pay for  
18 their's. I indicated that I had to check with my boss to be  
19 able to do that.

20 I have done that. I can't. But I never  
21 deviated, never have deviated from saying Mr. Englert will be  
22 a witness in the State's case in chief, and was identified as  
23 such all along.

24 THE COURT: Back to the major point what the  
25 motion is dealing with, I think I could use, if nobody else

1 could, from each side, a list of who your witness are going  
2 to be and what portion of the case identified to primary  
3 case, defense primary case, rebuttal primary case and then  
4 penalty phase, aggravating witnesses, mitigating witnesses,  
5 rebuttal of mitigation witnesses. And so I am going to order  
6 that both sides prepare a list of who you are actually going  
7 to call, who you know you are going to call, in other words,  
8 who are less certain and what contingencies that may be based  
9 on. And to have that done, I want to give you enough time to  
10 do that and have some meaningful list, not a -- you know, I  
11 am just going to call everybody that has been in my  
12 disclosure sort of list.

13 So give me a time frame for when you can  
14 have that done -- by both sides -- throw the weekend in  
15 between, because I think you may need that.

16 MR. SEARS: Nine o'clock tomorrow.

17 MR. BUTNER: Judge, I prefer to have at least  
18 until the end of the week to do that. How about Monday, if  
19 we file it Monday?

20 THE COURT: I will order it be filed by  
21 nine o'clock Monday morning. And that would be quite  
22 helpful, I think, to me and probably to both sides. I  
23 recognize where we are vis-a-vis the trial date.

24 MR. SEARS: And Your Honor, we still -- if  
25 some or all of the people who are listed in this motion in

1 this reply remain on the State's list, from our perspective,  
2 absent the kind of meaningful proffer that we asked for,  
3 disregarding the State's laundry list of supplements in which  
4 their name may appear in this case, we are at a point where  
5 we see absolutely nothing that would justify the work that we  
6 would have to do going forward to investigate these people if  
7 they turn up on the State's list.

8                   And to the extent that any of these  
9 people are identified as witnesses we seek to preclude show  
10 up on the State's list, I ask that even if the State puts  
11 them in their Monday list, those people could be precluded at  
12 trial. It is too late for them to -- you know, this  
13 started -- this is a process that started nearly two months  
14 ago, now. And we have nothing more that helps us understand  
15 who these people are or an assurance that these are real  
16 witnesses that have something that could possibly ever get in  
17 front of a jury in this case to justify our time and our  
18 expense in investigating.

19                   THE COURT: What is my authority under the  
20 rules to do that?

21                   MR. SEARS: 15.7.

22                   MR. BUTNER: Judge, I would disagree. First  
23 of all, they have been specified as to what they are going to  
24 testify about.

25                   Secondly, they have been identified --

1 for example, like Dr. Wineberg and Dr. Ruben, that  
2 they're -- Dr. Wineberg is not a witness, but he could be  
3 called in rebuttal because of the DNA, et cetera. These  
4 people have been identified as witnesses for months, and what  
5 they would testify about has been specified for months in the  
6 DRs.

7 THE COURT: Anything else, Mr. Sears?

8 MR. SEARS: I don't know how many times I can  
9 say the same thing, Your Honor, so I won't. I just won't.

10 THE COURT: I appreciate that.

11 I don't find the requirement of a proffer  
12 being provided by Rule 15.7, and to the extent that the  
13 witnesses have been listed in the past, I would not find that  
14 to be a requirement of the disclosure rules. However, I will  
15 order that the parties supply the Court and each other with  
16 the materials that I have identified by nine o'clock on  
17 Monday, so that hopefully some -- there is that "culling"  
18 word again -- some culling can be done so we are down to the  
19 concentration on those witnesses who would be necessary to  
20 have interviewed prior to the trial commencing and both sides  
21 can be prepared.

22 MR. SEARS: Your Honor, I realize you have  
23 ruled it and it's a little late to say this, but I spoke,  
24 perhaps, a little too quickly when I said that the authority  
25 for these preclusions is 15.7.

1                   In fact, the authority really, as we said  
2                   in our papers, comes from your order. We concede that the  
3                   disclosure rules do not, on their face, require a proffer.

4                   But we pointed the Court to its own order  
5                   and the State's own agreement to provide this proffer, and  
6                   that is the basis for this motion, that notwithstanding the  
7                   bare-bones disclosure that the State has made and will  
8                   continue to make, that with regard to these particular  
9                   witnesses -- not every witness on the list -- these  
10                  particular identified witnesses, the Court ordered and the  
11                  State agreed to provide a proffer. That proffer came back in  
12                  essentially a useless form to us. That's what we've been  
13                  complaining about here today, Your Honor.

14                 THE COURT: I guess I don't reach the  
15                  conclusion that the list and the information provided was  
16                  useless.

17                 MR. BUTNER: Thank you, Judge.

18                 THE COURT: We can start another issue at this  
19                  point. It is seven or eight minutes till 12, though. I  
20                  don't know that it would be very productive to start  
21                  something else at this point.

22                 MR. SEARS: Your Honor, I think we could use  
23                  the extra few minutes to do the things that we need to do  
24                  over the noon hour.

25                 THE COURT: Okay.

1 MR. BUTNER: Judge, do you know what motion we  
2 are going to argue next? Maybe we can hear from the defense  
3 about that?

4 THE COURT: I don't have any particular issue  
5 of one versus another.

6 Anything in particular that's next on  
7 your agenda, Mr. Sears?

8 MR. SEARS: Yes, Your Honor. We have a  
9 constellation of motions that were filed pretty much on top  
10 of each other with supplements, all dealing with preclusion  
11 of late-disclosed evidence. All of them have the same  
12 characteristic, that they all involve late-disclosed  
13 evidence.

14 There is a motion to preclude the  
15 late-disclosed UBS evidence and the State's motion to  
16 enter -- that's what the motion says -- certain UBS e-mails.  
17 Our motion to preclude -- which I think is really sort of the  
18 central motion -- our February 5th, 2010 motion to preclude  
19 late-disclosed evidence and to dismiss the death penalty as a  
20 sanction, which --

21 THE COURT: And that overlaps with what  
22 Miss Chapman argued previously so let's --

23 MR. SEARS: It does. It does. And that  
24 matter is actually technically under advisement --

25 THE COURT: It is.

1 MR. SEARS: -- and has been since February  
2 19th, but there are two supplements to that motion, and then  
3 a series of motions filed in sequence dealing with computer  
4 forensics, late Sorensen testing, the motion that we filed on  
5 February 26th -- I mean, I think all of these could be argued  
6 simultaneously. I don't know that it is necessary to  
7 separate them out one by one, because they are so closely  
8 related. And of great importance to us are the motions  
9 dealing with these late-disclosed experts -- Mr. Cooper and  
10 others. Mr. Gilkerson from the FBI. All of those need to be  
11 heard and resolved, so that is where we would like to start.

12 THE COURT: Okay. Let's start with the  
13 generalized motions for preclusion, then, and then the  
14 specific ones can follow after that.

15 MR. SEARS: Thank you, Your Honor.

16 THE COURT: Stand in recess until 1:30.

17 MR. SEARS: Thank you.

18 (Whereupon, a recess was taken at 11:53 a.m.  
19 to resume at 1:30 p.m. of the same day.)  
20  
21  
22  
23  
24  
25

APRIL 7, 2010  
1:35 P.M.

PRETRIAL MOTIONS

THE COURT: Record reflects in presence of the defendant and Mr. Sears. From the county attorney's office, Mr. Butner and Mr. Paupore. And I see Mr. Fields has joined us.

I will let both sides know I did issue another order following up on the previous order for jury panel member Smith to join us next Tuesday the 13th at 1:15. That was the juror who had some exposure -- potential juror who had some exposure to comments by husband or other information after the jury questionnaire. So, that will take place before we meet at 1:30 for the jury selection issues.

Mr. Sears.

MR. SEARS: Judge, in that regard you had said that we might have more time the morning of the 13th, if we needed it. Can I put my request in?

THE COURT: I am not sure of the current status. You can put your request in.

MR. SEARS: Will you note my request for the record?

THE COURT: I will.

MR. SEARS: Thank you.

1 MR. BUTNER: Judge, I don't have any time at  
2 that point in time. I can't tell you right now what I have  
3 got going on, but something is plugged in there, I know that.

4 THE COURT: I think there are some things  
5 plugged into my calendar at this point, too. We will see  
6 what we have when we are done.

7 MR. BUTNER: Maybe not. Maybe it is gone  
8 away.

9 THE COURT: Did you want to address something  
10 while Mr. Fields as joined us?

11 MR. BUTNER: That would be good, Judge. Over  
12 the lunch hour we got ahold of the MIS people and talked with  
13 them about these on-going problems and what the issues were.  
14 And I think Mr. Fields can probably speak to what the  
15 situation is in a more learned fashion, I hope, than I.

16 THE COURT: Mr. Fields.

17 MR. FIELDS: Well, Judge, we are -- I talked  
18 with the MIS director. We know there had been a couple of  
19 technical issues, but we haven't been hearing anything until  
20 recently in the last week or so. We are certainly willing to  
21 try to take care of the technical issues, and we are going to  
22 try to get the MIS people and Mr. Sears' folks and try to do  
23 at least a simulated test run this afternoon.

24 But I can assure the Court that we will  
25 cooperate fully with trying to get the video conferencing up

1 and running. Frankly, as far as I knew, the last I heard was  
2 a month or month and a half ago, so I kind of assumed that no  
3 news was good news, so this was a bit of a surprise to us.

4 On behalf of the MIS department and the  
5 sheriff's office, we will make every effort to fix any snafu  
6 they request.

7 THE COURT: I don't know to what extent you  
8 and Mr. Sears have had communication personally.

9 MR. FIELDS: Just a little bit.

10 MR. BUTNER: I would ask if there is a problem  
11 that Mr. Sears and company contact Mr. Fields, really,  
12 because he is here in Prescott, and he can work with them and  
13 the MIS people and he obviously knows much more about this.

14 THE COURT: I am glad to hear at least there  
15 is some effort. After the test run this afternoon, we will  
16 see what anyone can do about it.

17 MR. SEARS: We never had any difficulty  
18 getting ahold of or working with the MIS people. I didn't  
19 think Mr. Fields needed to be in the middle of that. We did  
20 not have a problem getting ahold of and working with the  
21 people at the jail.

22 THE COURT: It is just the working of the  
23 equipment, as I understand it.

24 MR. SEARS: Just getting it done. We will  
25 continue to try to cooperate, but my observation still hasn't

1 changed over the last week, which is we essentially have run  
2 out of time and this was always intended to be an  
3 alternative. We, for whatever reason, have not been able to  
4 make it work.

5 THE COURT: Thank you.

6 Thank you for being here, Mr. Fields.

7 Moving onto the further issues. I see  
8 Mr. Hammond has left us, but I presume that Ms. Chapman and  
9 you can handle the issues that are at hand.

10 MR. SEARS: We will proceed -- Mr. Hammond  
11 will join us shortly, but we will proceed without him.

12 THE COURT: I think Ms. Chapman was kind of  
13 covering these sorts of motions, in any event.

14 I had a general motion that, of course, I  
15 had under advisement with regard to discovery issues and the  
16 requested preclusion of death penalty as a sanction, and have  
17 received some additional supplements, some additional motions  
18 that have to do with much the same topic.

19 Miss Chapman.

20 MS. CHAPMAN: Sure. Your Honor, I am going to  
21 remain seated, if you don't mind.

22 THE COURT: Please.

23 MS. CHAPMAN: There are several topics areas  
24 that I think intersect here.

25 THE COURT: Feel free.

1 MS. CHAPMAN: What I would like to do is give  
2 you an update with respect to some of the items that were  
3 originally briefed in that February 5th motion that we  
4 discussed with you on the 19th that I think you took under  
5 advisement.

6 I know the State handed me some documents  
7 this morning that I think relate to some of those items that  
8 I imagine they will be speaking to. And then I also would  
9 like to talk to you about some of the motions that we filed  
10 since that time.

11 I think chronologically the two  
12 supplements that we filed immediately after that motion were  
13 with respect to Mr. Cooper, who was disclosed as an expert on  
14 February 18. We still have no report or no other disclosure  
15 from Mr. Cooper, other than his CV. He is apparently going  
16 to be testifying in the guilt and innocence phase of the  
17 trial, according to Mr. Butner at the argument on the 19th.  
18 However, we still have no idea what his testimony will be in  
19 substance. There has been no report from him, and we also  
20 intend and have filed a motion to preclude his testimony  
21 under Rule 702 that we will talk about later today.

22 There is -- Mr. Cooper's testimony is not  
23 related to a new area. Just generally speaking, it is with  
24 respect to the crime scene. The State was certainly aware  
25 since July of 2008 that there was a crime scene. This is not

1 a new item of evidence. There is no reason that the State  
2 was unaware that it needed a crime scene expert until  
3 February of 2010. Certainly, it's offered and provided no  
4 excuse or rationale for not disclosing this expert until just  
5 months before trial in this matter. And we ask you to  
6 preclude Mr. Cooper on the basis of the late disclosure  
7 alone.

8 The same is true with respect to this  
9 expert Cy Ray. He was also disclosed after we had briefed  
10 the February 5th motion. He is disclosed as a cell tower  
11 expert. I will note, as well, that a new expert on cell  
12 tower was disclosed, I believe, on March 17. That hasn't  
13 been briefed to Your Honor -- excuse me, March 30th. It may  
14 have been in the latest briefing, but as Mr. Sears has said,  
15 we can hardly keep up with the late disclosure and filing  
16 motions with respect to the late disclosure and the late  
17 disclosed experts and witnesses.

18 Mr. Ray was disclosed as an expert on  
19 cell towers on February 18. We have no CV with respect to  
20 Mr. Ray, or what his qualifications are with respect to cell  
21 towers. We have no report from him. We have no idea what  
22 the substance of his testimony will be. He was earlier  
23 disclosed as a witness with respect to the Blue Star aspect  
24 of this case.

25 Again, the State has known that cell

1 tower and cell phone data was going to be an issue in this  
2 case as early as July, 2008. There was no rationale to wait  
3 over a year to identify or for them to realize they needed a  
4 cell phone tower expert, and no rationale given for their  
5 failure to disclose him. We have been asking for cell phone  
6 data since at least November of 2009. And Your Honor will  
7 remember that that was part of the February 5th motion. We  
8 had been asking the State for disclosure that we realized we  
9 hadn't received and the State had repeatedly said that we had  
10 received it. And then lo and behold in February they late  
11 disclosed the data that we had, in fact, been asking for and  
12 said "we didn't realize we had it." So there is no reason  
13 that the cell phone and cell tower data was a surprise to the  
14 State. We had been asking for it. They had it. They  
15 repeatedly told us they didn't have it. They did have it,  
16 and they didn't disclose it to us until February.

17 I think those are the two supplemental  
18 pieces that were filed with respect to late disclosed experts  
19 subsequent to the filing of the February 5th motions that  
20 deal with those late disclosed experts, Mr. Cooper and  
21 Mr. Ray.

22 The next motion in terms of the  
23 chronology -- and I don't know if you want to have Mr. Butner  
24 to respond to those or just move on.

25 THE COURT: Go ahead.

1 MS. CHAPMAN: -- would be with respect to the  
2 D.P.S. computer forensic reports. That motion was filed on  
3 February 25th, the original motion.

4 THE COURT: Right.

5 MS. CHAPMAN: The original motion, Your Honor,  
6 dealt with three CDs of D.P.S. computer forensic reports that  
7 we had received, and that was back in February. Those were  
8 preliminary reports, apparently, with respect to the iPods,  
9 flash drives, hard drives, CDs and DVDs that had been seized  
10 in this case. At that time we raised the issue of the volume  
11 of the late disclosure with three months to trial, and we  
12 requested that you exclude the evidence based on the volume  
13 and the timing.

14 Certainly, we learned then during that  
15 February 19th testimony that D.P.S. and the State had these  
16 items for several months before they began to examine them.  
17 Most of the items were seized in July of 2008. Mr. Arthur  
18 and Mr. Page testified in February that they didn't begin to  
19 examine those items until November, over four months later.  
20 With respect to Mr. Knapp's computer, it was seized in  
21 January of 2009, and they didn't begin to analyze it until  
22 October of 2009. That was over ten months later.

23 The State has still failed to disclose  
24 EnCase files for those items. And as we explained in our  
25 motion to you, the EnCase file contains critical information

1 about all of the searches that D.P.S. performs and the  
2 analysis that D.P.S. performs, and it is critical to our  
3 evaluation and examination of the case -- or excuse me, the  
4 State's own analysis. We attached a portion of that manual  
5 to the motion and explained why it was critical to our  
6 examination. We still haven't received it. All of those  
7 facts remain undisputed by the State.

8                   Then on March 2nd and 17th, the State  
9 produced an additional seven CDs from Arizona D.P.S. Those  
10 CDs contained over 8500 pages of reports and e-mails. For  
11 most of those CDs, the examinations on those CDs were not  
12 requested until February of 2010. Your Honor, we provided  
13 supplemental briefing on this. I believe it was on March  
14 30th. I tried to do it shortly after we received it. Again,  
15 the State waited 19 months to request examination of this  
16 material and provided it to the defense with less than two  
17 months to trial. And frankly, at that time there is just  
18 simply no way for us to physically review the amount of  
19 material, those 8500 pages given the time remaining and given  
20 the avalanche of other late disclosure that we have received.

21                   Then on Friday, last Friday, April 2nd  
22 the State disclosed an additional five CDs of D.P.S. computer  
23 forensic materials. Most of those reports were requested in  
24 March of this year. Those CDs, I was advised yesterday,  
25 contain over 60,000 pages of materials, will cost us over

1 \$20,000 just to process, and it is just physically  
2 impossible. We are not in a position to review that  
3 material.

4 There is absolutely no reason why the  
5 State waited until February and March to request examination  
6 of items that it has had since July of 2008 and January of  
7 2009. There is no way for us to evaluate the D.P.S.  
8 examination of these items which we were constitutionally  
9 entitled to under the confrontation clause, and there is no  
10 excuse even offered by the State as to why they would wait so  
11 long to do this and to provide this information to the  
12 defense.

13 So we ask you to exclude all of the  
14 computer examination and D.P.S. testimony in this case given  
15 the State's late disclosure and failure to provide any  
16 rationale whatsoever for their failure to exercise due  
17 diligence and disclose this in a timely manner. That is with  
18 respect to the computer forensic examination.

19 THE COURT: Probably biting off enough for me  
20 and Mr. Butner to chew on.

21 MS. CHAPMAN: Sure.

22 MR. BUTNER: Thank you.

23 THE COURT: Mr. Butner.

24 MR. BUTNER: First of all, Judge, Mr. Cooper  
25 is subject to interview. We don't have a report from

1 Mr. Cooper. I don't know that we are ever going to get a  
2 written report from Mr. Cooper. But we can set up an  
3 interview with him any time the defense wishes to do that.  
4 They have not requested that. If they do request that, we  
5 will set it up in a timely fashion, and he was disclosed in a  
6 timely fashion prior to the time of trial.

7 We don't need to discuss the Rule 702  
8 objection at this point in time but this is not late  
9 disclosure. I think that we need to go back and remember  
10 that the Court ordered the State to do all of the disclosure  
11 that was within our possession on or about June 22nd, 2009,  
12 and we did at this point in time. We made tremendous efforts  
13 to make sure that all of the computers were completely  
14 copied, imaged, so to speak, in their entirety, as well as  
15 everything else that was in the State's possession. And  
16 there was that giant disclosure that took place on or about  
17 that date.

18 The D.P.S. computer forensic lab has had  
19 those computers at least since November, but there's evidence  
20 and they were preliminarily analyzed prior to that time. I  
21 draw the Court's attention and the defendant's attention  
22 to -- and let me give you this bunch of disclosure items  
23 right now, Judge, if I could for your reference when I talk  
24 about this. At the back of that packet is an e-mail.

25 MR. SEARS: We were given a stack of e-mails.

1 Is it the one that has a hand drawn diagram on the top?

2 MR. BUTNER: That's the one.

3 THE COURT: That is the one that Miss Chapman  
4 has in her hand.

5 MR. SEARS: Thank you.

6 MR. BUTNER: Under Bates item No. 1422,  
7 there's actually the next thing under there is 1423. This is  
8 some of the earliest disclosure that took place in this case.  
9 That particular e-mail, and I apologize because the copy is  
10 really bad. In fact, it is even worse than what I thought it  
11 was. But that particular e-mail is part of that preliminary  
12 examination of Mr. DeMocker's computer that took place back  
13 at the outset of this case and that was disclosed at the  
14 beginning. It was requested that D.P.S. analyze those  
15 computers early on. I don't know why the defense keeps going  
16 on the dates of February and March of 2010. Those  
17 examinations were requested very early on in the case.

18 I do understand, and it has been very  
19 frustrating for the State, too, that it took an exceedingly  
20 long time for the D.P.S. forensic lab to analyze those  
21 computers. In some instances, their explanations to me was  
22 well, you interrupted our analysis so you could get specific  
23 periods of e-mails from us. For example, when we presented  
24 the e-mails from the defendant's computer going back and  
25 forth with the victim's computer in Mr. Echols' hearing.

1 Those e-mails back and forth, those were interruption in  
2 their analysis of these computers, and were things that they  
3 had to stop and pull off of the computers. But they had been  
4 continuing to analyze these computers, basically, on-going  
5 from before November of 2008.

6 So don't think that that is accurate,  
7 Judge. And I offer you Bates Numbers 1422 and 1423, which  
8 allude to some of this e-mail. And, of course, some of this  
9 also came by way of Gallagher and Kennedy in response to a  
10 subpoena for things from them.

11 In regard to the cell tower expert, we  
12 were not aware that a cell tower expert was going to be  
13 necessary until it became apparent that the defense was going  
14 to try and, at least, shed doubt on the defendant by pointing  
15 the finger at Mr. Knapp. Mr. Knapp had been investigated  
16 almost immediately in this case, and his alibi was  
17 established through the testimony from his ex-wife and from  
18 his son in the investigation by Detective Brown.

19 It also was established at that point in  
20 time that he had made a voice mail call from the residence  
21 where he was at with his wife and son early on. We didn't  
22 think it was going to be a big problem in terms of the cell  
23 phone towers. However, I draw the defense attention to July  
24 of -- January 7 of 2010. At that point in time, a cell tower  
25 map was disclosed to the defense, and thereafter Detective

1 McDormett completed his reports with the cell tower  
2 information, and that was disclosed a little bit later. But  
3 that cell tower map information was disclosed on January 7,  
4 2010.

5 Similarly, the defense keeps talking  
6 about things like late disclosure, and I have got to digress  
7 to the crime scene diagram, because I present to the Court  
8 Bates No. 6434, which shows -- they say that the crime scene  
9 diagrams were disclosed in March or later. The fact of the  
10 matter is that on June 22nd of 2009, this crime scene  
11 diagram, which has accompanying measurements, was disclosed  
12 under Bates No. 6434. That is the same kind of thing that is  
13 going on.

14 Yes, the State does continue to refine  
15 some of the things that they have done, and by that I mean,  
16 going through the computers that were imaged prior to June  
17 22nd, 2009, and pulling off those e-mails. Judge, we were  
18 informed by the defense that they were doing exactly the same  
19 thing, and in fact, had pulled off e-mails from Carol  
20 Kennedy's computer that indicated that she was dating double  
21 digit guys, so to speak, ten or more individuals. They had  
22 the same information that the State had to analyze, and  
23 presumably they were doing that analysis. So we have  
24 disclosed all of those kinds of things early on.

25 The 8500 pages of reports and e-mails.

1 Judge, that stuff was requested much earlier. I don't know  
2 where they get the date of -- well, it wasn't requested until  
3 February or March of 2010. It may be something that was in  
4 the D.P.S. report. But I will tell you, it was requested  
5 much earlier. That is why those computers were at the D.P.S.  
6 forensic lab as early as November. And they may have started  
7 on them in November, but they were down there and had been,  
8 at least, preliminarily analyzed prior to that time and  
9 disclosure of that had been provided.

10 Similarly, I draw the Court's attention  
11 to Bates No. 1455, 14 -- not 1455, 1445, 1444, 14 43. This  
12 is really early disclosure, one of the first disclosures made  
13 in this case. It makes mention of the fact that  
14 Mr. Gilkerson of the FBI lab is looking at this footprint  
15 information. Do we have anything of value at that point in  
16 time? No, we don't have anything of value at that point in  
17 time. But he was identified very early on in this case. My  
18 assistant beside me could tell me when those disclosures were  
19 made, 1445, et cetera, but it was some of the first  
20 disclosure in this case.

21 Judge, you can't blame the State for not  
22 having its analysis of these computers done, when the fact of  
23 the matter is that all of the information that was being  
24 analyzed was already disclosed to the defense. And they had  
25 the same opportunity to analyze it. And as soon as we got

1 reports on this stuff, final reports from the D.P.S. experts,  
2 we disclosed it.

3 We will provide a CV concerning Mr. Cy  
4 Ray, our cell tower expert. We disclosed him as quickly as  
5 we got his name.

6 Additionally, for example, we disclosed a  
7 cell tower expert from Sprint because that became,  
8 apparently, important and that person was disclosed promptly  
9 on March 30th. That is the other cell tower expert, and that  
10 came about as a result of investigation on-going through the  
11 cell towers. I note that the disclosure of these items No.  
12 1440, 3, 4 and 5, that disclosure was made in November of  
13 2008. In that disclosure that is one of the things that  
14 Mr. Gilkerson's name was mentioned as one of the reviewing  
15 experts that was looking at the footprints.

16 I don't have anything further at this  
17 point in time.

18 MS. CHAPMAN: Your Honor, if I might take  
19 those backwards, because I think those are all really  
20 illustrative, and I am glad that Mr. Butner has brought to  
21 the Court's attention this document, particularly 1445,  
22 because it is precisely illustrative of what the problem of  
23 how the State's handled this disclosure and this  
24 investigation and what they failed to do. And how if the  
25 Court permits the State to rely on this excuse, that they

1 have this duty to continue to investigate, without compelling  
2 them to exercise their duty and due diligence, there would be  
3 absolutely no reason to have any disclosure requirement  
4 whatsoever. If the State can simply wait until the months  
5 and weeks before trial, to exercise due diligence to do what  
6 they should have been compelled to do 15 months ago, there is  
7 no reason for there to be any disclosure requirements and no  
8 reason for there to be any sanction permissible under the  
9 rules.

10 This FBI shoe print data base search  
11 request form was disclosed to us, and it is dated in  
12 September of '08. It was disclosed to us with a report that  
13 said no request was made. This isn't a request to Eric  
14 Gilkerson to do anything. It is a request saying this is  
15 what you have to do if you want a request to be made. No  
16 request was made to him until April of '09, and that is  
17 precisely the problem with the way the State's handled this  
18 case.

19 They knew in September of '08 they could  
20 have made a request. They didn't make a request. They  
21 didn't disclose to the defense that they were going to make a  
22 request. They made a request. They got a report in October  
23 and they didn't disclose it to us until February of 2010.  
24 So, the entire time that we are litigating these issues, the  
25 State is sitting on whether they are going to make a request

1 or not. They know they can make a request, and they do make  
2 a request. We don't have that information at all. All we  
3 know is that they could make a request, and they haven't made  
4 a request based on the disclosure that is available to us.

5 That is precisely the way they have  
6 handled all of the disclosure in this case. That is why we  
7 haven't been able to prepare to review what they have done,  
8 because then they do things late, weeks and months before  
9 trial, and dump disclosure on us that we are physically  
10 capable of reviewing, and then they say, we have a continuing  
11 duty to investigate. Right. You also had that duty to do  
12 that when you could have done in it September of '08, and you  
13 didn't do it. And when you did do it in October and got the  
14 report, and you should have given it to us then, and you  
15 didn't do it then, either.

16 So the fact that you eventually gave it  
17 to us in February of 2010, doesn't make the fact that you  
18 didn't do it in September of '08 right, and it doesn't make  
19 the fact that you didn't give it to us in October, when you  
20 got it, of '09 right either. And it certainly doesn't excuse  
21 it that finally gave it to us in February of 2010. None of  
22 that excuses the fact that we got it late, that we got it  
23 with no time to prepare, and that the State sat on it while  
24 they had it and knew we were litigating these precise issues.

25 So there is absolutely no excuse, and the

1 fact that the State disclosed a piece of paper that said they  
2 could have done something that they should have done, that  
3 they had an obligation to do under their duty of due  
4 diligence that they didn't do, which they eventually did and  
5 then late disclosed to us, is absolutely no rationale for  
6 them to be excused from their duties of disclosure. That has  
7 been repeated through out this case.

8 Let's talk about the computer reports.  
9 The February and March dates come precisely from the reports  
10 that are on those CDs. The report states, I was requested to  
11 do this by the County Attorney's office in February of 2010.  
12 I was requested to do this by the County Attorney's office in  
13 March of 2010.

14 I don't write the reports. I don't make  
15 the requests. I am just telling Your Honor and the Court  
16 when the requests were made. That is what the report states,  
17 that is what the disclosure says. Then the disclosure  
18 provides us with 8500 and 60,000 pages of information. We  
19 are not physically capable of reviewing that information.

20 It is not a matter of frustration, as  
21 Mr. Butner states, it is a matter of what we are  
22 constitutionally entitled to. We have had these three  
23 computers to evaluate. We have been performing those  
24 evaluations. That is not the point. We are entitled to  
25 evaluate and confront their evaluations and examinations. We

1 are not able to do that because they won't even disclose the  
2 EnCase case files that would permit us to do that.  
3 Apparently, their experts don't even know what that is, even  
4 though the EnCase manuals describes it as the most critical  
5 piece of information that EnCase creates. They don't have  
6 it. They won't disclose it to us. And we are  
7 constitutionally entitled to have that information to prepare  
8 to cross-examine and confront those witnesses. We don't have  
9 it today, and we are not able to review the volume of  
10 material they have given us.

11 With respect to the cell tower expert.  
12 Again, this is an issue where Mr. Butner says we disclosed it  
13 to them in January of 2010. That is exactly right, they did.  
14 And we have been asking for it since September of 2009,  
15 because we could tell from the disclosure, hey, look, you  
16 haven't given us everything you have. They repeatedly told  
17 us and they repeatedly told this Court, we have given you  
18 everything we have. There is nothing else there. We know  
19 that is not correct. Our expert needed it. We needed it.  
20 We told the Court we needed it. They told us it didn't  
21 exist, and it did.

22 The same thing is true with respect to  
23 these crime scene diagrams. Now, it is true, as Mr. Butner  
24 states, that this document 6434 was disclosed early on. It  
25 is also true that the document 17849, which is cited in the

1 motion that we filed on February 5th, was not disclosed to us  
2 until March -- or excuse me, until February of 2010. That  
3 document was made, and it states on it that it was from  
4 measurements that were taken in July of 2008.

5 We had repeatedly requested, both in  
6 writing and orally before this Court, from the State for all  
7 crime scene diagrams. Detective Brown referred to crime  
8 scene diagrams in his testimony in November. We made another  
9 request, and were repeatedly told there are no other  
10 measurements, there are no other diagrams. Well, come to  
11 found out, there are, just like there were additional cell  
12 tower and cell phone information that existed that we were  
13 told doesn't exist. They late disclosed it to us.

14 Somehow the State acts like their  
15 eventual late disclosure should exclude the fact that they  
16 hadn't disclosed it earlier, even though we had asked for it  
17 and demonstrated a need for it. I simply don't know how to  
18 respond to that. We identified the information we needed.  
19 We explained why we needed it. We wouldn't have asked for it  
20 if we didn't need it and hadn't identified a need for it. We  
21 were told it didn't exist. That was simply not true. And  
22 then it was finally disclosed, and the eventual disclosure is  
23 somehow seen as an excuse for the failure to disclose when it  
24 existed and when we asked for it.

25 THE COURT: It may be speaking to prejudice.

1 I am not sure how to interpret what Mr. Butner is saying.  
2 Speak to me about prejudice. If the measurements were based  
3 on the same diagram that 6434 is --

4 MS. CHAPMAN: What I can tell you about  
5 6434 --

6 THE COURT: -- and nobody told me precisely  
7 when the 17849 was created physically from the measurements  
8 that were made allegedly back in July of '08.

9 MS. CHAPMAN: 17849 is dated July of 2008. So  
10 I don't know when it was created, other than it has a date of  
11 July, 2008, and was disclosed to us in February. There are  
12 diagrams that come right after that that aren't dated. And  
13 there is a CD of drawings that was disclosed at the same time  
14 in February. But they are dated July of '08. The 17849 is  
15 dated July of 2008, and then the two pages after that are  
16 crime scene diagrams.

17 These measurements on Page 6434 are  
18 largely illegible. I can't read what the writing is on the  
19 diagram. So, I can tell that you in reviewing, without  
20 getting into too much detail, in reviewing these diagrams  
21 with our experts, we were told there should be other diagrams  
22 and other measurements from the crime scene that should be  
23 expected. And that is why we requested them. And we were  
24 told that those were needed for what our crime scene experts  
25 and analysts were doing. And that is why we asked for them.

1 We didn't have them for most of the month  
2 that that analysis was going on from the first responders at  
3 the scene. That is what I can tell you about the prejudice  
4 in terms of our need. We identified early on that we wanted  
5 them. And again, when Detective Brown testified in November  
6 and referred to them, I think Detective Brown also referred  
7 to the fact that there were recent crime scene diagrams.  
8 That was in November of '09. And when we wrote, we said we  
9 understand there were recent crime scene diagrams. We were  
10 told, no, those don't exist. We don't have any way of  
11 knowing other than those that were produced to us in February  
12 were dated July of '08.

13 MR. BUTNER: If I could clarify concerning the  
14 crime scene diagrams, Judge.

15 THE COURT: Okay. I will hear from you on  
16 that particular issue.

17 MR. BUTNER: My paralegal is looking for that,  
18 but they were prepared in relatively close proximity in time  
19 to the time that they were disclosed in February, I believe,  
20 of 2010.

21 THE COURT: Based on measurements that were  
22 taken back in July of '08?

23 MR. BUTNER: Exactly. Based on the  
24 measurements that were taken back in July of 2008.

25 And Detective Brown had been urged to

1 prepare them much earlier, but he hadn't gotten around to it  
2 for whatever reason, and finally prepared a so-called final  
3 crime scene diagram, and then it was promptly disclosed as  
4 soon as we got it.

5 MS. CHAPMAN: Your Honor, if I might --

6 THE COURT: We can go back to Ms. Chapman.

7 MS. CHAPMAN: There is a page that just says  
8 "office scene measurements," and has a date. I can show it  
9 to Your Honor. That was not disclosed to us until February,  
10 and it is dated 7/3/08. It has got a list of measurements of  
11 the rooms. And it lists from west wall, from south wall to  
12 the closet and lists a description, and that was not provided  
13 until February.

14 THE COURT: The measurement is different than  
15 what is 6434?

16 MS. CHAPMAN: Frankly, given my skill level, I  
17 can't -- it is literally a list of ladder west to south. It  
18 is in the narrative form, so that someone can create a  
19 diagram from the measurements. It is not a drawing. It is a  
20 list of measurements that was not disclosed until February.  
21 It is dated 7/3/08. That was not disclosed until February,  
22 2010. And we were told by our experts that we should expect  
23 that would have been created at that time and at the scene by  
24 first responders.

25 THE COURT: You may proceed. Thank you.

1 MS. CHAPMAN: To go back, Your Honor, with  
2 respect to -- and I think this argument with respect to  
3 Mr. Cooper may really get at the heart of what the difference  
4 between what the State sees as their obligation and this June  
5 disclosure deadline and what the defense sees as the  
6 obligation.

7 What Your Honor said at that hearing, and  
8 we cited it to you in the motion, is that the State has an  
9 obligation to exercise due diligence and disclose what is in  
10 their possession. And what Your Honor also said at that time  
11 is that late disclosure would be permitted upon a showing of  
12 good cause. What we took Your Honor to mean at that time  
13 what not that the State could delay doing whatever  
14 investigation until it got around to it, but that if the  
15 State had an item of evidence that it knew needed to be  
16 performed, or an area of expertise that it knew needed to be  
17 engaged, that it should engage that process and undertake to  
18 perform those tests and analysis. Obviously, if those tests  
19 and analysis were on-going where the expert had been retained  
20 but wasn't complete, that is not something the State could do  
21 if it didn't have.

22 But the State also couldn't wait until  
23 the months and weeks before trial to identify experts for  
24 areas that it knew in July of '08 and certainly October of  
25 '08, and certainly by June, needed to be engaged and the

1 reports that needed to be prepared and examinations that  
2 needed to be performed. If that is the case, Your Honor, if  
3 the State can always say, well, yes, we knew we needed to do  
4 that in July of '08. For example, yes, we knew there was a  
5 crime scene. We knew we needed a crime scene expert. We  
6 just didn't get around to doing it. So we didn't have it at  
7 the disclosure deadline. We just decided to do it a couple  
8 of weeks or a couple of months before trial. Then due  
9 diligence and the exercise of due diligence means nothing in  
10 the context of the disclosure obligations of the State. And  
11 that is exactly what they did here.

12                   There is no reason to think, and the  
13 State has explained no reason why they wouldn't think or  
14 understand that they would need or want a crime scene expert  
15 at the time that they discovered and developed the crime  
16 scene. To say that Mr. Cooper was not late disclosed in  
17 February makes absolutely no sense. There is no reason why  
18 the State wasn't aware they had a crime scene and wanted  
19 analysis of that crime scene before June when the Court  
20 ordered the disclosure deadline. It makes absolutely no  
21 sense to say that Mr. Cooper was not late disclosed simply  
22 because he was disclosed before trial, because the State  
23 finally got around to thinking about it or identifying him.

24                   That is not the exercise of due  
25 diligence. That is not what the Court's order said when it

1 set the deadline in May or June, and that is not what is  
2 contemplated by Rule 15.1, or by the Constitution, frankly,  
3 because there is no way that Mr. DeMocker or the defense team  
4 can prepare under the avalanche of late disclosure, given the  
5 way the State has responded and prepared in this case.

6 The same applies with respect Cy Ray.  
7 The defense, again, has been requesting the information with  
8 respect to the cell tower data since September. And again,  
9 that is because it became pretty clear to us that it hadn't  
10 all been disclosed. The State was aware that that is what  
11 the defense was doing since that time. To say it was not  
12 aware until February, doesn't make any sense, because the  
13 State was aware and the defense had been requesting that  
14 information for months before Cy Ray was disclosed.

15 And, again, Your Honor, I can print out  
16 for Your Honor, if Your Honor and the State need to see when  
17 the D.P.S. reports note that the examinations were requested,  
18 but both the five CDs that I have outlined for you, the dates  
19 and the CD names and numbers in the motions, and I can do so  
20 with respect to the seven that were disclosed on Friday, but  
21 the dates the examination were requested are identified in  
22 the report that February and March, the disclosures are  
23 staggering in terms of the numbers of documents, and it is  
24 impossible for us to review those and to prepare adequately  
25 to confront them and to review the kind of examination and

1 analysis that the D.P.S. computer forensic people performed.

2 And it is true that we have had those  
3 items for our own analysis, and as Mr. Butner said we have  
4 been conducting our own analysis and review. The question  
5 is, are we constitutionally entitled to have the State's  
6 analysis, to confront that analysis, to evaluate it in  
7 advance of trial, to evaluate it in advance of an interview  
8 of the five State's computer D.P.S. forensic experts, who  
9 have been identified, and are we able to do that given the  
10 State's disclosure. And given the over 70,000 pages produced  
11 in the last several weeks, we are simply not at this point,  
12 if any of it comes in, we are just not in a position to  
13 confront it.

14 THE COURT: Mr. Butner, is there any dispute  
15 about the number of pages that have been produced in the last  
16 three weeks?

17 MR. BUTNER: No, there really isn't, Judge.  
18 It is voluminous.

19 THE COURT: Any -- Ms. Chapman says you  
20 haven't presented any reason or justification for the  
21 disclosures that have been coming in the last three weeks.  
22 Do you have some statement with regard to that?

23 MR. BUTNER: I sure do. It took so long  
24 because it so voluminous. It took them that long to get  
25 through all of this stuff. And that is constant prodding and

1 requests from the County Attorney's office to get this stuff  
2 done, to get the analysis of these computers completed.

3 And we basically got the fact that you  
4 are part of what we are working on all the time, and we are  
5 trying to get this accomplished as quickly as possible. And  
6 in fact, the Yavapai County Sheriff's Office took a deputy  
7 and put him down there to help D.P.S. -- that is Detective  
8 Page -- to help D.P.S. to get that disclosure accomplished.

9 So in terms of disclosure efforts in  
10 regard to that computer forensic material, they were working  
11 on that many, many, many months, Judge.

12 THE COURT: But to the extent of that,  
13 basically, as I understand what may have taken place is there  
14 is massive volume that has been disclosed, not that the State  
15 intends to use every bit of the volume of what has been  
16 disclosed. There just hasn't been any selection from what  
17 has been disclosed of what the State is, even now, likely to  
18 use or not use.

19 MR. BUTNER: Yes, there has been. Part of the  
20 problem is you can't select until the analysis is complete.  
21 So, what we have done is we had to select before the analysis  
22 was completed. The items that we planned on using, first of  
23 all, they were disclosed in the *Chronis* hearing with all of  
24 those e-mails that were relied upon by Mr. Echols and placed  
25 into evidence in that hearing.

1                   Secondly, early on some e-mails were  
2 disclosed in this case as part of the initial analysis of  
3 computers in this case, and that is why I drew the Court's  
4 attention to that e-mail that was disclosed under Bates No.  
5 1423, 1422, that kind of information. And we provided the  
6 Court with a clean copy of that e-mail, which is one of the  
7 e-mails we were able to pull out of the defendant's computer,  
8 and its designated Wednesday, July 2nd, 2008. It doesn't  
9 have a Bates number on it, because it is part of these  
10 e-mails that we presented to the Court out of the defendant's  
11 computer, and then we were going to ask for special  
12 permission to use some of these e-mails.

13                   For example, that particular e-mail was  
14 disclosed under Bates No. 1423. It just looks to be in a  
15 different fashion. And it is a terrible copy. I can get a  
16 better copy for the Court. That is basically the same  
17 e-mail.

18                   So in terms of these e-mails, they have  
19 been disclosed. They were just disclosed in a, quote,  
20 unanalyzed fashion. And we have presented to the Court, and  
21 I gather we will go through these e-mails today in terms of  
22 what specific e-mails we would be allowed to use at trial, if  
23 any.

24                   THE COURT: All right.

25                   MS. CHAPMAN: I think just to make sure the

1 record is clear, with respect to that particular e-mail, this  
2 is an e-mail that has been identified in the UBS e-mails.  
3 And I would like to take that issue up specifically when we  
4 get there. If we are going to address that issue now --

5 THE COURT: No, I was just trying to  
6 understand generally what the position was with regard to the  
7 kind of volume what you are talking about versus what they  
8 are actually intending to use.

9 MS. CHAPMAN: My understanding is that the  
10 60,000 pages and the 8500 pages that we have gotten the last  
11 several weeks have not otherwise also been disclosed and  
12 produced and identified elsewhere.

13 THE COURT: All right. Anything else on your  
14 general issue, Mr. Butner?

15 MR. BUTNER: I just point out, Judge, those  
16 e-mails that are part of these reports and so forth, all of  
17 those documents that are part of these recently disclosed  
18 reports, those are things that came off of the computers that  
19 were imaged early on in the case and disclosed before the  
20 June 22nd, 2009, order.

21 THE COURT: Miss Chapman.

22 MS. CHAPMAN: Your Honor, I will move onto a  
23 different area. And I think what I would like to do, since  
24 we touched on it briefly, is talk about the shoe print  
25 information and the evidence that flows from that.

1                   The State had, as you just saw,  
2                   apparently information that it could have requested a shoe  
3                   print examination from the FBI as early as September of 2008.  
4                   That request, apparently, wasn't made at least until April of  
5                   2009. And we know that the FBI had contact with  
6                   Mr. Gilkerson in a report from him in October of 2009. His  
7                   report states that the photos, quote, most closely  
8                   correspond, end quote, with a particular shoe.

9                   That report was not disclosed to the  
10                  defense until February. We believe that information  
11                  constituted *Brady* information as of October when the State  
12                  had the information. The State's rationale was apparently  
13                  that it is not obligated to provide disclosure unless and  
14                  until it could connect that evidence to Mr. DeMocker in some  
15                  oblique way.

16                 That State withheld that report for five  
17                 months. That was during the time that we were litigating the  
18                 very issue of the prints behind the scene with your court,  
19                 and as a result the defense was not able to investigate or  
20                 hire its own expert for comparison purposes during this time.

21                 The State's own investigation, as we  
22                 understand it presently, reveals that there may be other  
23                 shoes with slight variations on this tread pattern. There  
24                 are several witnesses that flow from this late disclosed  
25                 report. There are two witnesses from La Sportiva that have

1 been identified. There is a witness from Outdoor ProLink  
2 that was not identified until March 10th. And then there is  
3 Mr. Fagen and Eric Gilkerson from the FBI, who is a late  
4 disclosed expert.

5                   There is still no disclosure regarding --  
6 there was no disclosure regarding the shoe print comparison  
7 until February. Again, we were litigating these issues and  
8 the *Willits* instruction before the Court while the State had  
9 this information and didn't disclose it to the defense.  
10 Mr. Gilkerson was not disclosed as an expert until February,  
11 even though the State had this report as early as October.

12                   In March the State disclosed still  
13 additional information from La Sportiva, including photos of  
14 shoe samples, printouts from web sites and sales data  
15 regarding other shoes. And we have also moved to preclude  
16 this information in later motions. They were just simply  
17 filed as soon as we got the late disclosure from the State.  
18 It was made after the original late disclosure.

19                   Also in March, the State asked  
20 Mr. Gilkerson for a different opinion than the one he  
21 originally made in October. Apparently, that opinion may  
22 have been disclosed in the last several days to the defense.  
23 I have yet to see it, but it may or may not have been  
24 disclosed. My understanding is from a report about that  
25 disclosure that he says it may match or be similar to some

1 particular pair of shoes.

2           The State sent the FBI a model shoe from  
3 La Sportiva. The defense has not been provided with any  
4 similar model shoe. And, Your Honor, our contention is that  
5 given that the State withheld this information for a period  
6 of five months, given that when the information was  
7 originally provided to the State in October, it constituted  
8 potential *Brady* information, and it was not disclosed. That  
9 all of the information pertaining to the shoe print and the  
10 shoe report should be excluded.

11           And closely related to this, Your Honor,  
12 the motion was not filed until March 30th, but we got a late  
13 disclosure about Commander Mascher, and you will remember  
14 that Commander Mascher was the subject of a preclusion piece  
15 in the February 5th motion. And during the hearing on  
16 February 19, Mr. Butner told the Court that Mr. Mascher would  
17 not be a shoe print identification expert, but he was simply  
18 offering Mr. Mascher on the issue of shoe tracking. And Your  
19 Honor made an initial finding at that time that Mr. Mascher  
20 didn't need to be qualified as an expert to offer  
21 observations about shoe tracking.

22           Apparently, since that time, and after  
23 Commander Mascher's defense interview, he has been engaged in  
24 some kind of shoe print comparison testing, and he has now  
25 provided us with a report on March 17 where he purports to do

1 shoe print comparisons. He purports to compare the sample  
2 shoe that was sent to the FBI with a photo of the shoe print  
3 from the crime scene. He also purports to draw conclusions  
4 between the sample shoe and the identity of heel patterns and  
5 size of shoes that left prints.

6 All of this was late disclosed to us on  
7 March 17.

8 THE COURT: Has he been listed separately as  
9 an expert witness?

10 MS. CHAPMAN: He was originally listed as an  
11 expert witness. We filed the motion on March 5th to oppose  
12 his being listed as an expert. Mr. Butner then on the 19th  
13 said he was an expert with respect to tracking. And then now  
14 we get this report that he is going to be, apparently, be  
15 performing or was performing some kind of comparison on shoe  
16 print identification or comparison, which Mr. Butner  
17 specifically said he was not qualified to do at the February  
18 19th hearing and wouldn't be offered to do at that hearing.  
19 So, we are also asking that you preclude that.

20 In that same March 17th disclosure, we  
21 also got disclosure that Sergeant Winslow, apparently after  
22 the defense interview and after the original motion about his  
23 proffered testimony, was also doing some kind of shoe print  
24 comparison where he was looking a photographs from the scene,  
25 and apparently identifying the direction of tracks and

1 comparing tracks from different photographs. And we are also  
2 objecting to him being offered or offering any kind of  
3 testimony about the comparison of tracks between photos and  
4 amongst photos. He has not been offered or identified as an  
5 expert with respect to tracking.

6 Originally on the 19th, Mr. Butner  
7 identified Commander Mascher and Detective Kennedy as  
8 tracking experts. Apparently now that has changed, and  
9 Commander Mascher will also be offered as a print comparison  
10 expert, and apparently so will Sergeant Winslow. We would  
11 object to both of those as late disclosed and also as  
12 unqualified.

13 And again, Your Honor, all of these  
14 issues are late, and we are trying to keep up with the late  
15 disclosure and the interconnectiveness of this, but since we  
16 are dealing with the shoe prints, we got the original  
17 disclosure late. We got it well after the State had it, and  
18 then we are told these people are not going to be testifying  
19 about these particular issues, and then we are told that they  
20 are not qualified to testify about these particular issues,  
21 and then we are told they are going to be testifying about  
22 these particular issues.

23 We get reports after the defense  
24 interviews that they are performing, apparently, experiments  
25 on shoe print comparison, that we have been told they are not

1 going to be offering and that they are not qualified to do.  
2 So we think all of this has been presented and disclosed in  
3 violation of the order, your order, in violation of Brady,  
4 and in violation of our right to confront this evidence and  
5 that Your Honor ought to preclude it on those bases. All of  
6 it, the shoe print comparison and examination at this point.

7 THE COURT: Mr. Butner.

8 MR. BUTNER: Judge, there is no change in  
9 terms of the State offering Commander Mascher as an expert on  
10 shoe print comparison. We are not intending to do that.

11 You know, when we have been arguing this,  
12 the Court made reference to a particular case, Amaya Ruiz,  
13 and cited as *State versus Amaya Ruiz*, 166 Arizona 152, a 1990  
14 case of the Supreme Court. And basically, and I am sure the  
15 Court is familiar with this, the court found that even  
16 testimony from lay people that those things look similar,  
17 very similar, that is really not a problem. And quite  
18 frankly, that is all anybody would be seeking to do in this  
19 case in terms of testimony from like, for example, Detective  
20 Winslow or Detective Kennedy or Commander Mascher, but none  
21 of those people will be testifying as an expert.

22 I didn't request Commander Mascher to go  
23 and compare the shoe prints to the footprint photographs, so  
24 that he could be prepared to testify as an expert on that,  
25 and I never have listed him as an expert on that. I did

1 indicate that he was going to be listed as an expert on  
2 tracking, and I do think that he is specially qualified to  
3 testify in that regard. So I think that is a different kind  
4 of a thing.

5 But let's back up to Mr. Gilkerson's  
6 report. First of all, it is not *Brady* material, Judge.  
7 Nothing about it is exculpatory. It never was *Brady*  
8 material.

9 THE COURT: Why not?

10 MR. BUTNER: Because it didn't exculpate. In  
11 fact, it inculpated.

12 THE COURT: Why did it not exculpate when you  
13 first learned of it prior to any comparison being done that  
14 identifies to it possible shoes or similar to possible shoes  
15 or like possible shoes that Mr. DeMocker has? Why do you  
16 hold off on disclosing that information five months, four  
17 months from when you learn it until you do have information  
18 that connects it up to -- allegedly connects it up to  
19 Mr. DeMocker?

20 MR. BUTNER: First of all, we can go back to  
21 the very beginning when I showed -- when I pointed out that  
22 disclosure under the numbers of 1445, 3 and 2. If you  
23 notice, there is a note on that disclosure from John Hoang,  
24 H-O-A-N-G. And Mr. Hoang is the guy that said, you know  
25 what, these things don't match, and the photographs are not

1 good enough to do me any good anyway. And that is  
2 basically -- and there is a couple of odd looking shoe print  
3 models that are presented there. We didn't think anything  
4 was any different at that point in time. And we got a report  
5 from Gilkerson that, basically, didn't seem to be any  
6 different than anything that had previously been disclosed.

7 I was not aware of that report from  
8 Gilkerson that came in October 22nd of 2009 for a couple of  
9 months. When we found out about that report, and it was then  
10 related to a specific kind of shoe that had been purchased by  
11 Mr. DeMocker, that is when we realized we have something here  
12 that we need to promptly disclose, and it was disclosed  
13 immediately. But it was never exculpatory evidence, Judge.  
14 It turned out to be inculpatory evidence, and it didn't  
15 change anything in this case. The situation at that point in  
16 time was that there is no shoe prints that match anything  
17 that Mr. DeMocker has.

18 THE COURT: When you have it identified or  
19 possibly similar to a particular shoe, why isn't that  
20 possibly exculpatory or probably exculpatory?

21 MR. BUTNER: I wouldn't say it was "probably."  
22 It might have been possibly exculpatory. All we had, if I  
23 understood the statement that came out of the report, was  
24 something that most closely corresponds with a particular  
25 type of shoe.

1 THE COURT: That was the La Sportiva?

2 MR. BUTNER: Yes, the La Sportiva manufactured  
3 type shoe. If I recollect what was in that report, it was  
4 related to some kind of other shoe not identified as the same  
5 one that ultimately ended up being purchased by Mr. DeMocker.  
6 But it turned out that there were three shoes of that type  
7 that had that sole.

8 THE COURT: When we are talking about what  
9 comparisons Gilkerson is making with the La Sportiva shoe,  
10 what are we talking about in terms of location of where those  
11 allegedly were found?

12 MR. BUTNER: We are talking about, of course,  
13 the footprints out in the land behind the crime scene.

14 THE COURT: Which one?

15 MR. BUTNER: Which footprint?

16 THE COURT: Are we talking about footprints on  
17 the Carol Kennedy back door part of her property, in the  
18 yard? Are we talking about comparisons to something that I  
19 heard goes back and forth behind, on the other side of the  
20 fence from her yard? Are we talking about something that is  
21 back out close to where the alleged bike tracks were?

22 Do we know which --

23 MR. BUTNER: That is a really good question,  
24 Judge. I don't really know specifically. I was of the  
25 belief all along at that point in time that we didn't have

1 any pictures that were good enough to make any kind of  
2 comparisons with even.

3 THE COURT: Right now you don't know what  
4 Gilkerson is comparing the La Sportiva shoe to, as far as  
5 which precise print and where it was located.

6 MR. BUTNER: That is exactly right. I don't  
7 know that. That may be known somehow through investigation,  
8 but I don't know that as I sit here before the Court. I know  
9 that it was made from some poor quality photographs, quite  
10 frankly, and we were told that those weren't of sufficient  
11 quality to even make comparisons from.

12 THE COURT: If the status was as you knew it  
13 in October, what if the status was not as you may know it or  
14 think you know it in January, but there is some connection  
15 between Mr. DeMocker and a La Sportiva type of shoe, would  
16 that not be potential *Brady* material if Mr. DeMocker had  
17 never bought a La Sportiva shoe?

18 MR. BUTNER: Yes. I think it would, Judge. I  
19 can't tell you that no, that wouldn't be possible *Brady*  
20 material. I think it would be. And when I got a report  
21 about it, when I found out about it, I would promptly  
22 disclose it. And I would fully have expected to receive such  
23 a report from the detective that had gotten that information  
24 from Gilkerson.

25 THE COURT: But even as of October, you

1 didn't, knowing that there was a connection at that point by  
2 Gilkerson with a print somewhere back there and a La Sportiva  
3 shoe of a particular sort. And we still may or may not have  
4 some disagreement between experts on both sides, if there are  
5 such, as far as whether there are additional shoes that could  
6 correspond in a similar vain to the track that was found.

7 MR. BUTNER: I didn't know about it in  
8 October, didn't know that it could even possibly be *Brady*  
9 material. I understand that there is --

10 THE COURT: Aren't you charged with knowing  
11 that?

12 MR. BUTNER: Absolutely. I was just going to  
13 say I understand that. There is an on-going duty on the part  
14 of the prosecutor in any kind of a case to be looking for  
15 *Brady* material when it is in our possession. Okay? And I am  
16 cognizant of that duty. And I certainly feel as if I would  
17 have lived up to that duty had it been brought to my  
18 attention or had I discovered it, Judge.

19 THE COURT: When it comes to your attention is  
20 actually after they hook it up.

21 MR. BUTNER: When it comes to my attention --

22 THE COURT: When it comes to your attention  
23 that there is a marking on the shoe that is equivalent to a  
24 La Sportiva type shoe, that really doesn't come to your  
25 personal consciousness, maybe it comes to the consciousness

1 of investigators, but not to yours until they hook it up with  
2 a possible purchase.

3 MR. BUTNER: That's correct. I was aware in  
4 the Fall of 2009 that Detective McDormett was continuing to  
5 investigate the shoe prints and had contacted the FBI about  
6 that. I was aware of that. I was not aware that they had  
7 achieved any results in regard to that.

8 THE COURT: Thank you.

9 Miss Chapman, back to you.

10 MS. CHAPMAN: Your Honor, I don't think that  
11 the preclusion based on the fact that it was *Brady* is a  
12 personal -- has anything to do with what Mr. Butner knew or  
13 didn't know.

14 THE COURT: I don't disagree with that.

15 MS. CHAPMAN: The fact is that the report was  
16 in the Yavapai County Sheriff's Office possession in October.  
17 The report said that the footwear impressions closely  
18 correspond to a particular shoe. That at that time, based on  
19 what we knew, and based on what the County Sheriff's office  
20 knew, that information was potentially *Brady* information. I  
21 believe it is still may be potentially *Brady* information.  
22 Based on what we know right now, it should have been  
23 disclosed in October. Those issues were being litigated  
24 during that time. They are still hotly contested now, and it  
25 wasn't disclosed. That is the bottom line. For whatever

1 reason, it is not a punitive sanction, but it wasn't  
2 disclosed for five months while we were litigating these  
3 issue.

4 THE COURT: What is the prejudice now? Do you  
5 have a shoe print expert that can analyze whether other shoes  
6 are potential sources for the same sort of thing?

7 MS. CHAPMAN: We are working to try to do that  
8 now. The prejudice is that we lost five months of time. The  
9 prejudice is that we haven't had the access, the same access  
10 to these witnesses that the State had during this time. We  
11 don't have --

12 THE COURT: "These witnesses" meaning  
13 Gilkerson?

14 MS. CHAPMAN: There are all kinds of witnesses  
15 from La Sportiva, from the people who make the sole in China.  
16 Unfortunately, the sole is manufactured in China.

17 THE COURT: I understood that from your  
18 motion.

19 MS. CHAPMAN: It is not an investigation that  
20 happens in a short amount of time. It is not a simple  
21 investigation. And the other thing is that these shoes are  
22 not sold anymore. We don't have a sample shoe. We can't  
23 perform the same kind of examination that the State has now  
24 had performed because we were never sent the sample shoe, we  
25 can't go out and buy the shoe, so our expert is simply

1 incapable of performing the same analysis that has now been  
2 performed.

3 We still don't have -- I haven't seen,  
4 maybe it has been disclosed in the last couple of days, but  
5 whatever this ultimate report from Gilkerson is. The  
6 prejudice is that we are not in a position to evaluate and  
7 respond and analyze the same evidence that the State has. We  
8 are five months behind, and we have got less than four weeks  
9 to go. So, I don't think the prejudice can be overstated  
10 given those circumstances.

11 THE COURT: Mr. Butner, speak of the nature of  
12 this in terms of its impact to the State's case.

13 MR. BUTNER: Judge, this is extremely  
14 important information. I can't really overstate its value.  
15 It is physical evidence that through investigation  
16 establishes a link with the defendant and the crime scene.  
17 It establishes that he purchased these shoes in 2006 from  
18 this outfitter in Boulder, Colorado. And that these shoes  
19 have since disappeared from his closet. And that the shoe  
20 prints from these shoes are most closely correspond with a  
21 particular shoe, the shoe prints do, the particular shoe  
22 having been in the possession of the defendant.

23 Judge, you know, there is basically case  
24 law that says that if it is inculpatory, it can't be  
25 exculpatory, so to speak. And if they are asking to exclude

1 it because it is inculpatory, then it can't be exculpatory,  
2 slash, *Brady* material.

3 We have been extremely diligent in  
4 disclosure in this case. As soon as this information was  
5 gathered and two plus two equal four, this was provided to  
6 the defense. Prior to that time, the situation was exactly  
7 the way it had remained since the day of the crime. That is,  
8 that there is some footprints in the outback area there, and  
9 we aren't able to match them up with anything.

10 And then ultimately we discover, when  
11 this is actually litigated in January of 2010, that these  
12 footprints are of insufficient quality and the photographs  
13 are of insufficient quality that we can't match them to any  
14 shoes. It is just an on-going investigation. We do continue  
15 these investigations. The discovery rules under Rule 15.6  
16 allows us to continue investigating when we have evidence,  
17 and in fact, we have a duty to do that. And as soon as we  
18 find something, we disclose it.

19 If we had exculpatory evidence and we  
20 were aware of it, just as we had disclosed Mr. Hoang's  
21 evidence, we would disclose Mr. Gilkerson's evidence. We  
22 didn't think we had anything any different than we had when  
23 we disclosed Mr. Hoang's evidence, Judge. And we disclosed  
24 the Gilkerson evidence very promptly when we realized that we  
25 had something of significance in this case.

1 THE COURT: I think I kind of interrupted the  
2 flow of the general discussion that we were having by  
3 concentrating on this one, so I will go back to Miss Chapman.

4 MS. CHAPMAN: Your Honor, if I could just  
5 close out with respect to this argument. The other thing, I  
6 think, especially putting in context in terms of a sanction  
7 for late disclosure in this kind of situation where we're not  
8 able to do the same kind of experiments. We had a five-month  
9 delay. These soles are manufactured in China. The prints  
10 were not preserved from the original photographs. We don't  
11 have a sample shoe. We cannot do the same kind of testing.  
12 And the report's hearsay. The shoes most closely correspond.  
13 These may be the same shoes. There may be other shoes with  
14 slight variation.

15 There is a lot of room here for potential  
16 continued investigation that we are just simply not able to  
17 do. And the conclusions in these reports, "most closely  
18 correspond," "may be related," "may be other shoes," and we  
19 are just not in a position to do that. Particularly in a  
20 death penalty case where this is the margin of error, and the  
21 State had this information for five months and we are five  
22 months behind the curve ball where these other situations  
23 exist, preclusion, we think, with this amount of time and the  
24 amount of delay that occurred between the State's receipt of  
25 this evidence and the disclosure, is really the only

1 appropriate remedy given the amount of time we have and the  
2 kinds of conclusions that are in the report and the kind of  
3 examination that could remain to be done.

4 With that said, do I hear Your Honor  
5 correctly, that you would like us to move from the shoes into  
6 a different area?

7 THE COURT: Just to cover the rest of the  
8 general motion, if you would.

9 MS. CHAPMAN: Sure. I think that takes us,  
10 Your Honor, to next in time, I think, would be the UBS  
11 e-mails. Do you want to do that?

12 THE COURT: Yeah, that is probably good. We  
13 have some time before I want to take the break, if everybody  
14 is okay with that.

15 Go ahead.

16 MS. CHAPMAN: Your Honor --

17 THE COURT: Do you need a break?

18 MR. SEARS: No, Your Honor.

19 THE COURT: Okay.

20 MS. CHAPMAN: Your Honor, we had originally  
21 filed a motion to preclude. As you will recall, we received  
22 another 23,000 pages late disclosure of UBS documents.  
23 Mr. DeMocker, you will recall, was arrested in October of  
24 2008 at his place of employment, which was UBS. So the State  
25 was certainly aware that Mr. DeMocker was employed by UBS in

1 October of 2008, however, they failed to subpoena UBS  
2 documents until December of 2009.

3 Then in February of 2010, they did a  
4 document dump of 23,000 pages of UBS documents. We moved to  
5 preclude those documents on February 24 of 2010, and Your  
6 Honor found at that time that the State did not act with due  
7 diligence in requesting these documents and disclosing them  
8 to the State, and at that time you entered a order generally  
9 precluding the documents.

10 Sometime thereafter, I believe it was the  
11 8th of March, 2010, the State filed a motion to introduce  
12 approximately 197 e-mails.

13 THE COURT: March 5th.

14 MS. CHAPMAN: March 5th, they moved to  
15 introduce 197 e-mails.

16 Your Honor, we filed a motion to oppose  
17 the introduction of those e-mails on several grounds.  
18 Primarily on the ground that we had originally asked you to  
19 preclude those e-mails, that being primarily that the State  
20 has failed to exercise due diligence with respect to  
21 requesting those e-mails, failed to show good cause for their  
22 failure to request those e-mails, that it was a disclosure  
23 violation under Rule 15, it was a violation of your order  
24 setting a disclosure deadline.

25 They certainly knew and had a duty of due

1 diligence to request those documents. They knew as of July  
2 of '08 that Mr. DeMocker worked at UBS and could have  
3 requested those e-mails at that time.

4 It is also impossible and remains  
5 impossible for us to review that quantity of e-mails. And if  
6 Your Honor just let's them introduce any of these e-mails,  
7 frankly, we are in a position that we have to review all of  
8 them to make sure they are done in context.

9 Then, Your Honor, with respect to the --  
10 I have them here. I am not sure what this is about, but we  
11 were handed a small subset of them this morning. It is  
12 distinct from the 197 that we were originally provided by the  
13 State. So I will let the State speak to that.

14 With respect to the 197, and I am not  
15 going to go over them one by one, but I can categorize them,  
16 and they are also largely irrelevant. The first 140 largely  
17 deal with a business split between Mr. DeMocker and  
18 Ms. O'non. As Your Honor has heard, that business split was  
19 nearly finalized, and it is simply not relevant to the issues  
20 that need to be decided. And, Your Honor, I think that just  
21 on the basis of relevance, those first 140 e-mails can be  
22 excluded, period. That split was nearly final. They were  
23 simply waiting for approval from UBS people who were on  
24 vacation given the summer holiday, and there is absolutely no  
25 reason why that information should be submitted to this jury,

1 given what this jury is called upon to decide.

2 I don't know if you want to go category  
3 by category.

4 THE COURT: That works.

5 MS. CHAPMAN: Or all the categories.

6 THE COURT: I think it works if you go through  
7 all of them.

8 MS. CHAPMAN: Then there were two e-mails, 141  
9 and 143 that were discussing the death of Carol Kennedy.  
10 This is an e-mail exchange between Mr. DeMocker and certified  
11 financial planner explaining and Mr. DeMocker's absence and  
12 withdraw from the program, also completely irrelevant.  
13 Absolutely no reason why this information should be brought  
14 before this jury.

15 The third category was misidentified by  
16 the State in its motion. 144 through 148 are e-mails between  
17 Steve and Carol. There is, again, there is nothing relevant  
18 in these e-mails between Mr. DeMocker and Miss Kennedy. And  
19 there is no conceivable reason why these e-mails would be  
20 offered.

21 The other 149 through 158 are e-mails  
22 between Mr. DeMocker and others. It is not clear why those  
23 are being offered, and they were misidentified by the State  
24 as being between Mr. DeMocker and Ms. Kennedy. I am not sure  
25 what that error was. The State didn't reply to our motion.

1                   With respect to the e-mails, the forth  
2 category of e-mails that were sent on July 2nd, these e-mails  
3 deal with varying items from the casual dress code on the 4th  
4 of July at UBS and other issues, which again, we are at a  
5 loss to determine the relevance of.

6                   And then there are a category of e-mails  
7 regarding Mr. DeMocker's cell phone. Apparently, the State  
8 wants to present Mr. DeMocker had a cell phone by use of  
9 these e-mails. And again, query what the relevance of these  
10 would be.

11                   Then there are a series of e-mails  
12 between Mr. DeMocker and Barb O'non. This is 186 through  
13 196. Certainly, the State knew about Ms. O'non's  
14 relationship with Mr. DeMocker as early of July of '08.  
15 There is no reason why they were unaware of this relationship  
16 or couldn't have investigated this earlier. And there is  
17 nothing relevant about these e-mails in particular, and  
18 particularly given the hearing we had last week, I don't  
19 think these e-mails would be admissible or relevant given  
20 Your Honor's rulings from last week.

21                   Lastly, there is an e-mail, e-mail 197,  
22 which is, in part, identified in the Bates number document  
23 1422 through 1425 that Mr. Butner handed to Your Honor  
24 earlier. You can see when you look at 1422 that this e-mail  
25 came, apparently, from Gallagher and Kennedy. 1423 appears

1 to be a screen shot from a computer in box. As Your Honor  
2 can see, and anyone who looks at it can see it is also  
3 illegible and doesn't have any text on it.

4 1424 is a screen shot from Jennifer,  
5 whose last name I won't pronounce, Rydzewski. There is no  
6 date on this. It doesn't say who the e-mail was from or who  
7 the e-mail is to. And the last page also has no information  
8 about who the e-mail is from or who the e-mail is to.

9 The e-mail that was identified as 197  
10 doesn't have a "to" or "from" on it. It does have the text  
11 that is identified in 1424 about the joint account. It also  
12 identifies that it was sent before Ms. Kennedy's death when  
13 Mr. DeMocker and Ms. Kennedy were in the process or had  
14 finalized their divorce, so would obviously be terminating  
15 any joint accounts they had. So to us, there is no  
16 foundation for this e-mail. We don't know who it was to. We  
17 don't know who it was from. The fact that it was disclosed  
18 in an illegible, undated, and otherwise unintelligible format  
19 of these pages, 1422 through 1425, doesn't make that any  
20 different than as it was raised in our motion with respect to  
21 the UBS e-mail.

22 We can think of no excuse why the State  
23 would wait 15 months to request these e-mails. There is no  
24 way for us to review the 23,000 pages. And we would ask you  
25 to remove and exclude all of these e-mails as a sanction

1 under 15.7 for late disclosure. These were not requested  
2 until December of '09. They were not provided to us until  
3 January. We simply don't have the capacity to review this  
4 volume of disclosure. They are not relevant, and there is no  
5 excuse for the State's treatment of this disclosure at this  
6 juncture in a death penalty case.

7 THE COURT: Thank you.

8 Mr. Butner.

9 MR. BUTNER: I provided the Court with a  
10 packet of e-mails. Going from bottom to top, so to speak, in  
11 terms of e-mails, e-mail 197 is a copy of the e-mail sent  
12 from Mr. DeMocker to Jennifer Rydzewski on July 2nd, 2008, at  
13 3:34 p.m. That is the same e-mail referenced in the  
14 disclosure under Bates No. 1422, 23 and 24. And if the Court  
15 will note under Bates 1424, that e-mail is quite legible and  
16 readable. And basically, it was disclosed in one of the very  
17 first disclosures in this case back in November of 2008.

18 And it is relevant because Mr. DeMocker  
19 is making a statement at that point in time in terms of  
20 burying a file and setting it on fire.

21 THE COURT: Well, don't misquote it. It says  
22 would you mind closing this account, setting it on fire and  
23 burying it.

24 MR. BUTNER: Exactly. It is a joint account  
25 with Carol Kennedy, and that is his statement in regard to

1 that. So, I think it is relevant because it is made in close  
2 proximity to the time of the homicide, evidencing his state  
3 of mind at that point in time.

4 Moving up from the bottom to e-mail 150,  
5 and it says UBS e-mail 150 and then 153 follows that. Those  
6 are two e-mails that basically talk about the disagreement  
7 that Mr. DeMocker and his ex-wife are having. And these are  
8 statements made by Mr. DeMocker to other people by way of  
9 e-mail about his problems with the amount of the QDRO and his  
10 disagreement with what is going on with his ex-wife and the  
11 on-going dispute over the distribution and divvying up of the  
12 QDRO, so to speak. It demonstrates the on-going dispute  
13 after the divorce between Carol Kennedy and the defendant in  
14 this case.

15 Then moving up to e-mail 144. This is a  
16 statement made, an e-mail directed -- it is e-mail 144 and  
17 145, and I don't know where 146 is, because I think this is a  
18 continuation. These e-mails talk about the on-going dispute  
19 between Mr. DeMocker and Carol Kennedy, and it is  
20 communication from Mr. DeMocker to Carol Kennedy back and  
21 forth about the resolution of their financial affairs and  
22 whose going to pay what, the \$20,000 on the UBS Visa account  
23 and the on-going dispute about finances in there.

24 THE COURT: That is all except 144, though,  
25 are long before the divorce settlement.

1 MR. BUTNER: No, its --

2 THE COURT: February 29 of '08, April 10 of  
3 '08.

4 MR. BUTNER: 144, I have --

5 THE COURT: While the divorce is going on?

6 MR. BUTNER: Right. It is one that is  
7 dated --

8 THE COURT: That is what I said, all but 144  
9 are prior to the case being settled. It is while the case is  
10 going back and forth.

11 MR. BUTNER: That's true, Judge. 144 is  
12 issued on July 1st of 2008.

13 THE COURT: The others are March 3rd,  
14 April 10, February 29.

15 MR. BUTNER: That's correct.

16 And then coming up to e-mail 141 and 143,  
17 these are basically statements made by Mr. DeMocker, in  
18 essence, that are trying to cover up, if you will, what the  
19 M.E. discovered, which was that this was a homicide, and this  
20 was discovered, of course, on July the 3rd of 2008 and became  
21 a murder investigation virtually immediately, and then he is  
22 telling people that the M.E.'s report is due any day, et  
23 cetera, and he is trying to minimize his involvement, so to  
24 speak, in the situation.

25 And then coming up from that, the e-mails

1 are correctly described by opposing counsel between  
2 Mr. DeMocker and Barb O'non and others, basically how he is  
3 describing the on-going difficulties -- actually, I think  
4 they are almost all between Mr. DeMocker and Barb O'non --  
5 how they negotiate back and forth the on-going difficulties  
6 in resolving or dissolving, rather, their partnership  
7 culminating with the e-mail No. 35, which basically describes  
8 the agreement. And this is an e-mail to Jim Van Steenhuyse,  
9 basically stating that they have worked out a 70/30 split on  
10 that.

11 And those are significant because they  
12 are corroborative of Barbara O'non's testimony that there was  
13 this on-going dispute over their business and how it was  
14 going to be divided, and ultimately it what resolved on or  
15 about the same date as the murder of Carol Kennedy.

16 These e-mails, all of these e-mails were  
17 not part of --

18 THE COURT: June 24th is No. 35.

19 MR. BUTNER: I think it is. Right.

20 And it noted that it is going to be --  
21 they would like to effectuate that on July the 1st at that  
22 point in time.

23 And, of course, then e-mail No. 3 is  
24 dated July the 2nd in the morning, talking about the proposed  
25 split at that point in time, and the fact that it still had

1 not been approved by management, so don't make any changes.

2 So it demonstrates this on-going  
3 negotiation. It is corroborative of Barbara O'non's  
4 testimony. It demonstrates the on-going financial stress  
5 that Mr. DeMocker was under, culminating on July the 2nd of  
6 the year 2008.

7 All of these e-mails were pulled off of  
8 those mirror images of the computers, rather than through  
9 D.P.S. forensic analysis. It simply had to be done in that  
10 fashion and printed out that way, hence part of the problem  
11 with the voluminous nature of the disclosure from the State  
12 on e-mails. Because we didn't get it from D.P.S., we ended  
13 up having to just pull it off and then print them out  
14 ourselves. And finally we went through them, thousands of  
15 them, and were able to -- here's that word again -- cull  
16 these out as being the most relevant e-mails in this case.

17 THE COURT: Do you want to speak to any of the  
18 other issues that are important according to the case law  
19 with regard to considerations of whether exclusion is  
20 appropriate or not?

21 MR. BUTNER: Judge, I don't think there is any  
22 prejudice in this regard. This is information that was in  
23 the hands of the defense, basically, almost as long as it was  
24 in the hands of the prosecution. And it comes off of the  
25 mirror imaged computers that were provided to the defense and

1 have been scrutinized by their experts, as well as ours. And  
2 I don't think that the Court has heard any prejudice  
3 concerning these e-mails and their disclosure. In fact, they  
4 basically state things that have been apparent as we  
5 proceeded through this case. We found this information by  
6 printing out thousands of e-mails and going through them.  
7 Nothing that the defense couldn't have done at exactly the  
8 same time, and I think that, in fact, they were doing that at  
9 the same time, at least in regard to Carol Kennedy's  
10 computer.

11 THE COURT: Back to you, Miss Chapman.

12 MS. CHAPMAN: A point of clarification, we  
13 never received mirror images of the UBS hard drive. These  
14 e-mails were dumped on us in a 23,000 page dump in February.  
15 We never got a mirror image of any UBS hard drive. Our  
16 understanding is that the State requested these e-mails in  
17 December of '09, and received them in February of 2010, and  
18 that is when we received them. We received them in a 23,000  
19 page dump, and then in March we got the 197 e-mails, and then  
20 today we have another subset that was just disclosed to us  
21 this morning, that has also been disclosed to Your Honor. We  
22 never got a mirror image of any UBS hard drive.

23 I am not sure why Mr. Butner thinks we  
24 could have done anything differently than what we did, or  
25 could have searched the UBS hard drive, because we never

1 received it.

2 With respect to prejudice, the prejudice  
3 is that we aren't in a position to review those 23,000 pages.  
4 We simply don't have time given the avalanche of repeated and  
5 continual late disclosure from the State's side. And we are  
6 obligated to review all of those, if they introduce any of  
7 these.

8 I think Your Honor could -- the prejudice  
9 is that we have an obligation, if you are going to introduce  
10 any of these, to review all of them, and we don't have time  
11 to do that. And the State has a duty of due diligence that  
12 it failed to exercise in not requesting any of these e-mails  
13 until December of '09.

14 And Your Honor already found that they  
15 failed to exercise due diligence in failing to request these  
16 until December of '09, when it knew in July of '08 and  
17 certainly as of October '08, when they arrested Mr. DeMocker  
18 at his UBS office, that UBS e-mails may be relevant.

19 Your Honor, I would think in looking  
20 through these e-mails, and Your Honor has noticed that in  
21 reviewing them, these e-mails could be excluded under  
22 relevance. There is nothing in here that speaks to any  
23 relevant or live issues. When you look at the dates, the  
24 dates are well before -- between Mr. DeMocker and  
25 Miss Kennedy are well before the divorce.

1 THE COURT: With a few exceptions, yes.

2 MS. CHAPMAN: With the one exception that I  
3 think we saw.

4 The e-mails between Mr. DeMocker and  
5 Miss O'non are stating that the resolution of their business  
6 disagreement is final before Ms. Kennedy's death. They  
7 worked it out.

8 This last page e-mail that the State is  
9 interested in introducing doesn't say who it is from or who  
10 it is to. There are major issues with these e-mails. And  
11 the State simply can't wait until a mere month before trial  
12 to decide to do what it should have done 15 months earlier,  
13 dump it on the defense and then call it our problem.

14 That is not the way the disclosure rules  
15 are contemplated, that is not what Your Honor ordered. And  
16 the prejudice is we simply don't have time to review all of  
17 this material.

18 THE COURT: The reference Mr. Butner made to  
19 the defense bringing to the Court's attention certain e-mails  
20 between Miss Kennedy or Mr. DeMocker to Miss Kennedy or  
21 Miss Kennedy to Mr. DeMocker were not from the UBS materials.  
22 That was from other materials, as I understood it.

23 MS. CHAPMAN: That's correct. We haven't  
24 utilized, because we haven't had time to review any e-mails,  
25 we haven't processed these e-mails because we haven't been

1 able to process these e-mails, and we have asked Your Honor  
2 to exclude them.

3 THE COURT: Mr. Butner, the correction or  
4 clarification for the record that Miss Chapman wanted to  
5 speak of, the UBS was not separately copied or separately  
6 available to the defense from the -- or was it -- from the  
7 scans that were made of the hard drive and --

8 MR. BUTNER: Some of that was, Judge. And it  
9 is my understanding that all of these e-mails came off of the  
10 defendant's laptop computer -- or rather his business  
11 computer. And that is where we got them, also.

12 The stuff from UBS that the Court found  
13 was not timely, I believe that this is a duplication of a lot  
14 of those things that we got from UBS. But I will tell you  
15 that I had been trying to get that information -- I know the  
16 Court has ruled on this -- I have been trying to find out  
17 about that for many, many months, and it resulted finally in  
18 a separate subpoena to UBS. It was basically with the  
19 guidance of UBS counsel. We were not aware that we could  
20 even get that information until I subpoenaed it back in  
21 December, I think, is when ultimately I did that.

22 THE COURT: Your impression is, or your  
23 understanding of the facts is, that while these came from a  
24 computer system that is under the control of UBS, the ones  
25 that precisely refer to communications by Mr. DeMocker or to

1 Mr. DeMocker were also on his personal computer that was  
2 imaged.

3 MR. BUTNER: I think they were on his business  
4 computer.

5 THE COURT: I mean his personal business  
6 computer, not referring to his household computer, but his  
7 office computer that was assigned to him at UBS.

8 MR. BUTNER: That's correct.

9 MS. CHAPMAN: Just to be clear, we never got  
10 an image of his personal office computer.

11 THE COURT: You just got an image of the home  
12 computer?

13 MS. CHAPMAN: We got an image of the home  
14 computer, but we don't have an image of his personal office  
15 computer. We have an image of his laptop.

16 THE COURT: Office laptop or home laptop?

17 MS. CHAPMAN: I believe it was his home  
18 laptop. You will see that these are from Barbara O'non. And  
19 they are marked UBS e-mail. That is how they are Bates  
20 labeled. So, they are not from Mr. DeMocker.

21 MR. BUTNER: Judge, I believe his business  
22 computer was imaged and was provided to the defense, along  
23 with the images of the other computers.

24 MS. CHAPMAN: You will see there are other  
25 people's e-mail from here. Patrick Berkenshaw {phonetic

1 spelling} from him to other people. From Sue Young. They  
2 are not from Mr. DeMocker.

3 THE COURT: But to Mr. DeMocker?

4 MS. CHAPMAN: To Mr. DeMocker and a string of  
5 other people.

6 MR. BUTNER: Right.

7 THE COURT: So, if there was an imaging of the  
8 business computer assigned to Mr. DeMocker, the ones received  
9 may have been on there, as well as being on some UBS general  
10 system. I guess I am unclear about the representation that  
11 is made from a factual standpoint of what the defense has  
12 versus what the State has provided. I am not clear on that.

13 MS. CHAPMAN: Looking at this e-mail 145, it  
14 says -- it is an e-mail from Mr. DeMocker to Ms. Kennedy  
15 saying, I am forwarding the message to my g-mail address and  
16 ask you correspond with me there. Because the e-mail came  
17 from the UBS account, I can't use my personal e-mail account  
18 on Friday. Indicating these came from his UBS e-mail  
19 accounts, not his personal e-mail account. That's where  
20 these e-mails came from.

21 I don't believe that we have a copy of  
22 the UBS computer. That is where I believe these came from.

23 THE COURT: Can you check that? I am going to  
24 take a break.

25 MR. BUTNER: We are trying to check that right

1 now.

2 THE COURT: We will take a recess at this  
3 point, about 15 minutes.

4 (Brief recess.)

5 THE COURT: Record reflects the presence of  
6 Miss Chapman, Mr. Sears, Mr. DeMocker, Mr. Paupore,  
7 Mr. Butner.

8 Before we start going again on these  
9 discovery issues, request for sanctions issues, clerk's  
10 office left a message with my office today about is there  
11 some deadline for when exhibits are supposed to be coming in  
12 because they imagine that there is going to be a large number  
13 that they are going to have start marking. Questions about  
14 whether any of the exhibits that were previously used in  
15 other hearings are going to also be used, the precise  
16 exhibits also be used as part of this.

17 So, I think I need to set some  
18 requirement on the prosecution first and then the defense, in  
19 terms of deadlines to get with the clerk's office about the  
20 exhibits. And I am not sure that we have an identification  
21 of said date. So in terms of timing, do you think that you  
22 all can start with the State's exhibits, identify which ones  
23 from prior hearings you are going to use, and start doing  
24 that with the clerk's office the 19th of April, that week?

25 MR. BUTNER: Yes.

1 THE COURT: And then have the -- I will let  
2 you do what you can with the exhibits for that week, and have  
3 the defense start with its exhibits on the 26th, the week of  
4 the 26th.

5 MR. BUTNER: You just said from prior hearings  
6 on the 19th of April; right? Do you mean all exhibits?

7 THE COURT: I want you to have as many of the  
8 non-bulky or non-OSHA sensitive or contraband materials as  
9 you can. Those other things can come in as we are into the  
10 trial days. But I want the other things marked, or the  
11 process begun for getting those marked earlier, so that the  
12 clerk's staff can do that for you, and it is not being done  
13 in trial.

14 MS. CHAPMAN: Basically all paper exhibits?

15 THE COURT: Paper exhibits, photographs,  
16 things like that that you are likely to be using.

17 MS. CHAPMAN: To provide to the clerk?

18 THE COURT: To provide to the clerk. For the  
19 State, the week of the 19th, and the subsequent week, the  
20 week of the 26th for the defense. So that when we start the  
21 actual trial of the case, which is probably going to be after  
22 the 6th or 7th of May --

23 MS. CHAPMAN: Would we customarily exchange  
24 them, or how do you handle that?

25 THE COURT: The clerk's office, and I think

1 they probably already provided both sides with this, sends  
2 out a notice about wanting those sorts of things timely.  
3 Usually, because the State goes first, the State has the  
4 earlier numbers, but we may get to some mix of numbers later  
5 on that, you know, you have some defense intervening numbers  
6 and then have some State numbers after that, so defense  
7 numbers after that.

8 MS. CHAPMAN: Do we exchange exhibits in  
9 advance? Is that your practice to have the parties exchange  
10 exhibits in advance or not?

11 THE COURT: List of exhibits. But, I presume,  
12 that exhibits themselves have been -- Mr. Sears is more  
13 familiar.

14 MR. SEARS: Because we anticipate that the  
15 paper exhibits will be voluminous and they will be difficult  
16 to manage -- I think this discussion started today when some  
17 of our paralegals were here and went up and talked to Tina  
18 Fenton, who is the exhibits clerk, where some of this came  
19 from.

20 THE COURT: Probably.

21 MR. SEARS: But what we were thinking of was a  
22 way to digitize the paper exhibits. But it wouldn't make  
23 much sense to do that unless we had the clerk's numbers in  
24 advance. But if each side exchanged CDs with scanned copies  
25 of the digits, I think it would be possible to go back

1 electronically and add the exhibit number. That way, rather  
2 than the tiny little exhibit table and the tin box, we would  
3 be able to use exhibits -- you know, in other electronically  
4 updated courtrooms, there are all kinds of options.

5 THE COURT: We are still in a courthouse that  
6 was built in 1916, I think.

7 MR. SEARS: I could feel it yesterday, the day  
8 before yesterday, in the wind.

9 What I was thinking of is if we had  
10 documents that were scanned, each side could use those in a  
11 number of different ways. It would be easily retrievable  
12 without wasting the time to go through thousands of indexed  
13 paper exhibits to get the right ones, and then have piles of  
14 paper scattered around the courtroom. When we are talking  
15 about exchanging exhibits, that is what we were thinking of  
16 doing.

17 THE COURT: It certainly sound feasible to me.  
18 And to the extent that you know how many exhibit numbers you  
19 are definitely going to have, which I don't presently have  
20 that illusion, you may want to reserve some numbers for these  
21 other exhibits that may be bulkier or OSHA sensitive or  
22 contraband or other -- have some other reason for not  
23 bringing them in precisely on the 19th or the 26th, as the  
24 case may be.

25 But an issue in connection with that is

1 that the appellate level courts, of course, will need  
2 photographs as substitutes for those kind of physical  
3 exhibits. They don't take those anymore down at the  
4 appellate level courts or the Court of Appeals or Supreme  
5 Court. So be prepared with that kind of stuff for  
6 substituting as an exhibit.

7 Another question precipitated by the  
8 defense staff, apparently, was to what extent there is some  
9 place in the building to store materials. Obviously, if you  
10 want to leave things in from Wednesday through Friday, or  
11 Tuesday through Friday in the courtroom, when you are the  
12 only game in town, so to speak, that's fine. But in terms of  
13 having a secure storage room elsewhere, I simply ask that you  
14 give with court admin. I am not aware of any particular --

15 MR. SEARS: We are thinking of our own  
16 materials. We are going to have boxes and notebooks and all  
17 kinds of things that we are going to be bringing to court.  
18 If there was a secure place in the courtroom where we could  
19 just lock those up, rather than moving them back and forth  
20 every day.

21 THE COURT: There isn't in the courtroom.  
22 Maybe there is a place like that in the courthouse, but I  
23 don't know where it is, frankly. Space is at a premium in  
24 this building.

25 Those were a couple of issues that I

1 wanted to take care of before we resumed.

2 Any other issues like that that you think  
3 need to be addressed or deadlines that need to be addressed?

4 MR. PAUPORE: Your Honor, maybe motion  
5 deadlines.

6 THE COURT: Yesterday. That is when  
7 disclosure stops. I think that is set by rule.

8 Back to the issues at hand. I guess I am  
9 not precisely sure where we left off, other than generally  
10 speaking about the --

11 MR. BUTNER: Judge, I can clarify where we  
12 left off.

13 THE COURT: You were trying to find out some  
14 information about UBS.

15 MR. BUTNER: Exactly. What I found out is,  
16 yes, Mr. DeMocker's business computer was seized under  
17 evidence item 301 and it was imaged, but these e-mails were  
18 not captive on Mr. DeMocker's computer. These came off of  
19 the central server back at UBS headquarters. And I apologize  
20 to the Court, because I was of the understanding that they  
21 came off of a duplicate hard drive, so to speak, that had  
22 printed out these e-mails from Mr. DeMocker's computer.

23 THE COURT: So what you are saying is these  
24 were not also on Mr. DeMocker's office computer.

25 MR. BUTNER: No.

1 THE COURT: They were solely on the UBS  
2 computer.

3 MR. BUTNER: That's correct, Judge. His  
4 computer didn't captive or capture these e-mails, but rather  
5 they were only on the UBS server back in New Jersey.

6 THE COURT: Thank you.

7 In terms of where the argument was as  
8 between counsel, were you finished then, Mr. Butner?

9 MR. BUTNER: Well, just to clarify, Judge, I  
10 think that these -- this small amount of e-mails that we are  
11 requesting to use in this case is reasonable under the  
12 circumstances. And I don't think that, basically, that we  
13 have -- I don't believe that the defense has been prejudiced  
14 in any regard as a result of these e-mails.

15 And similarly, with the shoe print  
16 testimony, I don't believe they have been prejudiced by that.  
17 The rule for sanctions under 15.7 talks about a requirement  
18 that counsel confer concerning these things and see if we can  
19 resolve them, that has never taken place in this case.  
20 Actually, what is going on in regard to this stuff is just  
21 machine gun motion fire, so to speak. As soon as we disclose  
22 the shoe print evidence, they filed motions on it trying to  
23 keep it out, and the same thing is going on with these  
24 e-mails.

25 THE COURT: Miss Chapman, back to you.

1 MS. CHAPMAN: Your Honor, Mr. Butner,  
2 apparently, doesn't think we are prejudiced by anything.  
3 That is what he said every time we filed a motion. We have  
4 promptly brought these issues to the attention to the Court  
5 repeatedly, because the disclosures have been made late and  
6 repeatedly. We haven't complained about every late  
7 disclosure made. We have complained about those that  
8 prejudice us. We have tried to detail about when the  
9 disclosures were made, when the State had the information.  
10 We have been very detailed and we have been very specific  
11 about what the prejudice has been to us from the State's  
12 behavior.

13 And from -- to speak specifically, I  
14 think -- I don't want to rehash what we already said about  
15 the shoe print evidence, but I think it is kind of breath  
16 taking to me that specifically given that evidence Mr. Butner  
17 doesn't see how the prejudice has been for the defense in  
18 this case, particularly given the time we have remaining, the  
19 kind of results that the examination is at this point, given  
20 the language of those reports, what examination could remain  
21 to be done, and the inability of the defense to conduct those  
22 examinations given the time frame we have remaining. And it  
23 is just breathtaking.

24 With respect to the UBS e-mails, we don't  
25 have the capacity to review the 23,000 e-mails. For

1 Mr. Butner to cherry pick, what I guess now is even a smaller  
2 subset than the 197 he cherry picked originally to present to  
3 the jury from the 23,000 pages that were produced to us in  
4 February with a few mere months to trial in a death penalty  
5 case that has been pending for over 15 months is prejudice.

6 I don't have time, the defense team  
7 doesn't have time to review these late disclosures in the  
8 avalanche of additional late disclosure that the State makes  
9 and continues to make. We can't take these, however many  
10 e-mails that have been cherry picked now from among the 197,  
11 and take their word that these are the only relevant e-mails.  
12 We would have to review all of them. That is the prejudice.  
13 We don't have time to review it.

14 The State has also still failed to  
15 provide any rationale, whatsoever, for waiting until December  
16 of '09 to go and request e-mails from Mr. DeMocker's  
17 employer, whom they knew he was employed by from the date of  
18 the crime. They arrested him at his place of employment. So  
19 there is no reason for them to wait 15 months to request this  
20 information in a death penalty case.

21 There is no way for us to keep up with  
22 this avalanche of late disclosure. We have repeatedly tried  
23 to raise this issue with the Court. We have repeatedly  
24 written to Mr. Butner in letters, so I am not sure how he  
25 thinks we haven't done our duty to try to resolve these

1 issues with him, to ask for disclosure early and often, and  
2 they repeatedly failed to do that.

3 At this point the State has offered no  
4 other alternative sanction. A sanction is required unless  
5 they couldn't have done it through due diligence, or unless  
6 there is no prejudice. It is clear they didn't exercised due  
7 diligence. Your Honor already made that determination on  
8 February 19th. It is clear we are prejudiced because we  
9 simply don't have time in the time remaining to do what is  
10 required of us to do, to confront this evidence, to review it  
11 as we would be required to do if any of this comes in. And  
12 the State hasn't provided us an opportunity to do that given  
13 their irresponsibility in requesting and disclosing this  
14 information at this late date.

15 THE COURT: Thank you.

16 What issues do you want to take up next  
17 with regard to this general heading?

18 MS. CHAPMAN: Chronologically, I think the  
19 next motion is the FINRA motion, Your Honor, but I think  
20 where we left that issue, and I just for the record want to  
21 be clear about this, the State had indicated that they don't  
22 expect to discuss this other than in rebuttal. And, so, if  
23 we are going -- if we are talking about mitigation rebuttal,  
24 which is what I think we are talking about, then as long as  
25 we preserve the issue that we will address the due process

1 confrontation and other issues about what is permissible in  
2 rebuttal testimony before the State uses that information. I  
3 don't think we need to address it now. If they intend to  
4 present it in any other format, then I would like to take it  
5 up.

6 THE COURT: Mr. Butner, can you clarify at  
7 what stage of the proceedings the FINRA information may be  
8 used?

9 MR. BUTNER: Yes. In the event that the  
10 defendant presents evidence of good character, then I believe  
11 the FINRA evidence becomes relevant at that point in time,  
12 Judge, and would be usable.

13 THE COURT: So in case in chief, or in  
14 mitigation, depending on when the defense may raise it.

15 MR. BUTNER: No, it would have to be rebuttal.

16 THE COURT: If the defense in the primary  
17 case, the guilt or innocence phase of the case, presents  
18 evidence of good character in their part, then it would be in  
19 rebuttal, but in the initial trial.

20 MR. BUTNER: Yes, I think it could be used in  
21 rebuttal.

22 THE COURT: And if not used there, and if the  
23 defense doesn't raise good character as part of their case of  
24 defense to the guilt or innocence phase, and they use it  
25 subsequently in -- if there is an aggravation hearing and a

1 mitigation hearing, and they raise it in that stage, then the  
2 State is asking to be able to raise it in the rebuttal, but  
3 not the first aggravating phase.

4 MR. BUTNER: Correct. It is rebuttal  
5 evidence.

6 MS. CHAPMAN: Your Honor, this position is  
7 different than what the State took in their response to our  
8 motion. And I think this would be 404(b) evidence. We ask  
9 to have a 404(b) hearing on this issue. These issues are  
10 unresolved by FINRA. And the State specifically said that  
11 this would only arise during the rebuttal of the mitigation/  
12 aggravation phase. That is what they said in their pleading.  
13 That is what they said prior to the 404(b) hearing. If that  
14 is not their position now, we request an immediate 404(b)  
15 hearing on these issues.

16 MR. BUTNER: If I could have a moment, Judge.

17 THE COURT: Yes, you may.

18 Judge, to clarify the State's position,  
19 we are not going to use this at all as part of the main  
20 trial, so to speak. But rather, we would reserve the right  
21 to use it at the penalty stage, but we don't plan on using it  
22 at all during the main trial.

23 THE COURT: Is that more clear, Ms. Chapman?

24 MS. CHAPMAN: It is, Your Honor. And I think  
25 we have made clear, and I think that Your Honor has already

1 indicated an intent to hold a hearing prior to the  
2 introduction of any rebuttal at any aggravation or mitigation  
3 phase, because I think there are significant issues as to the  
4 admissibility of this and other evidence that the State has  
5 identified they intend to introduce as rebuttal at  
6 aggravation and mitigation. And we have concerns about the  
7 admissibility of this and other evidence, and would like a  
8 chance to litigate the admissibility of that before we get to  
9 those phases. But if Your Honor doesn't want to take it up  
10 today, that is fine with us, as long as we have an  
11 opportunity to do that prior to those phases, assuming we get  
12 there.

13 THE COURT: All right. Then I will consider  
14 that the March 10th motion filed by defendant and the State's  
15 response filed March 22nd and defendant's reply in connection  
16 with those issues are reserved for a possible post-verdict  
17 hearing, if it is needed.

18 MS. CHAPMAN: Okay.

19 Your Honor, the next chronologically is a  
20 March 10th motion to preclude late disclosed evidence. That  
21 motion was filed based on late disclosure that was received  
22 by the defense on March 4th and 5th. And we can take up  
23 those issues now.

24 THE COURT: Okay.

25 MS. CHAPMAN: Specifically, those issues, I

1 think, can be grouped into a couple of categories. Those are  
2 bank accounts. There were several bank accounts. One was a  
3 J.P. Chase account that was known by the State as of February  
4 of 2008 and not disclosed -- excuse me, as of June of 2009; a  
5 Chase account that was identified by the State in February of  
6 2008; a UBS account that was known in November of 2009. None  
7 of those were disclosed to the defense until March of 2010.

8 The State acknowledges that the  
9 information was known to them well before the disclosure.  
10 They offer no response about why they failed to exercise  
11 their due diligence, no good cause for their late disclosure.  
12 These bank accounts and reports are disclosed to us with  
13 weeks left to trial.

14 The same is true with respect to phone  
15 records that were disclosed to us in March for a period of  
16 time in June. The State acknowledges that they were aware of  
17 this time frame in mid-June, and yet failed to subpoena or  
18 disclose this information to the defense until March.

19 THE COURT: Specifically, those refer to  
20 Miss Gerard?

21 MS. CHAPMAN: They do, Your Honor.

22 And I want to also, both with respect to  
23 bank accounts and with respect to phone records, I filed  
24 additional briefing on March 30th because the State continues  
25 to disclose late disclosure with respect to additional bank

1 accounts. There was an FIA account that was known to the  
2 State in December of '08, and a Provident Funding mortgage  
3 that was known to the State in November of '08 that wasn't  
4 disclosed until March 17th and briefed on March 30th.

5 And then there were additional phone  
6 records for additional parties, but during that same time  
7 frame. That wasn't disclosed again until mid-March and  
8 briefed again to Your Honor at the end of March.

9 Again, the State acknowledges that they  
10 knew about these issues, the phone issues specifically, in  
11 mid-June of '09, and failed to disclose to the defense until  
12 March of this year, and knew about the bank records in '08  
13 and failed to do anything about it until March of this year.

14 They don't provide any excuse for their  
15 failure to exercise due diligence. They don't provide any  
16 showing of good cause for why they failed to do this. Again,  
17 Your Honor, at this late date the defense doesn't have a way  
18 to get this information to the experts. The experts don't  
19 have time to review and evaluate it.

20 And the State rightly says that Your  
21 Honor needs to consider alternative sanctions, but the State  
22 doesn't provide any analysis about what alternative sanctions  
23 might be appropriate. With less than four weeks to trial,  
24 Your Honor, we have no idea what alternative sanction other  
25 than preclusion would be appropriate. The State continues to

1 make disclosures. Since the time that we filed this specific  
2 motion, the State has made approximately seven more  
3 disclosures, the latest happening this morning.

4 Also in this motion there were additional  
5 disclosures made with respect to the shoe print evidence,  
6 both with respect to FBI reports. There was a request for a  
7 new report. Apparently, that report was received just a few  
8 days ago, which we haven't yet filed a motion on, but it was  
9 also late received. There were sample shoes that were sent  
10 to experts that were not sent to us. Sample shoes provided  
11 to Commander Mascher, not provided to the defense, not  
12 disclosed to us. This all relates back to the disclosure  
13 from October of 2009 that was withheld from the defense for  
14 nearly five months.

15 And then also included in this motion  
16 were e-mails that the State had as early as September of  
17 2008, but did not disclose to the defense until March of this  
18 year, related to rental property that Mr. DeMocker rented.  
19 The State's only response is, well, the officer who had these  
20 didn't have much to do with the investigation.

21 Again, you know, just responding,  
22 reviewing, processing this volume of evidence when we are in  
23 the middle of trying to identify jurors four weeks out from a  
24 death penalty case, Your Honor, we simply don't have time to  
25 process this kind of information at this late date. The

1 State has had this information, in most cases, for well over  
2 a year and is just now disclosing it to us.

3 Some of this information, as I mentioned,  
4 has been supplemented by a March 30th filing, and there will  
5 be additional filings because we received and continue to  
6 receive additional disclosure. We would ask that Your Honor  
7 exclude this information simply because the defense doesn't  
8 have time to process it, get it to the experts and be  
9 prepared to confront it at trial.

10 We ask in this motion and the ones that  
11 are going to follow, when it is going to end? And, Your  
12 Honor, I just want to be clear because every time we have  
13 this argument, Mr. Butner stands up and says the State has a  
14 continuing duty to investigate. This is not about the  
15 State's continuing duty to investigate. This is about the  
16 State's duty of due diligence, and their failure to do 15  
17 months ago what they should have done, and their failure to  
18 disclose 15 months ago what they should have disclosed.

19 This is not new evidence. It is not new  
20 matters for investigation. There is nothing new about this.  
21 The only thing new is that the State is finally disclosing  
22 what they should have disclosed 15 months ago with absolutely  
23 no excuse for their failure to do so when they should have  
24 done so. And we are asking Your Honor to exclude this  
25 information.

1 THE COURT: Thank you.

2 State filed a response March 22nd  
3 concerning these particular issues. Mr. Butner.

4 MR. BUTNER: That's correct, Judge.

5 First of all, in regard to the bank  
6 accounts, the same bank accounts in this case have been  
7 subpoenaed over and over again, and we continued to get  
8 incomplete records multiple times. That is why multiple  
9 subpoenas ended up going out for these bank accounts. We  
10 also then discovered, once we got complete records,  
11 additional bank accounts, and that necessitated additional  
12 subpoenas for other bank accounts. It is like we have been  
13 chasing our tail when it comes to finding all of the  
14 defendant's bank accounts. He would open one and close it  
15 and move onto another.

16 And it has taken us all of this time with  
17 steady flow of subpoenas, and the defense has alluded to that  
18 fact, to get these records. And as soon as we get them, we  
19 disclose them to the defense. I would point out that,  
20 presumably, they have access to all of the defendant's bank  
21 accounts at every step along the way, but certainly we do  
22 not. So it necessitates subpoenas for those records. That  
23 is what we have been doing in regard to all of these bank  
24 accounts.

25 In regard to the La Sportiva shoe

1 information, that was disclosed on January 29 of 2010, and we  
2 have simply sought additional information about those shoes  
3 thereafter. This is not a new or different report from Eric  
4 Gilkerson that has been provided to the defense in recent  
5 disclosure, almost immediately upon its receipt, but rather  
6 it is a supplemental report that we requested Mr. Gilkerson  
7 continue to work on this with better photographs, if at all  
8 possible, so he could make sure about his opinions in regard  
9 to the La Sportiva shoes.

10 And I would also add at this point in  
11 time, Judge, these are shoes that were purchased by the  
12 defendant in 2006. He knew about the purchase of those  
13 shoes. Presumably he shared that information with his  
14 attorneys. They could check on that kind of stuff, too.  
15 This Outdoor ProLink information, that is the outfit that he  
16 bought the shoes from. That fellow that owns that company,  
17 to my understanding is a former acquaintance or a current  
18 acquaintance of the defendant's from Prescott College. He  
19 bought them from somebody he knew that runs a business, an  
20 internet business out of Boulder, Colorado. It was by sheer  
21 luck that we stumbled on to that information, pouring through  
22 the volumes and volumes of financial records and credit card  
23 receipts that were subpoenaed through bank records from the  
24 defendant.

25 In regard to the information about

1 e-mails between the defendant and Cheryl Hatzopoulos, I hope  
2 I said that correctly, H-A-T-Z-O-P-O-U-L-O-S, that  
3 information, yeah, it was discovered relatively early on, but  
4 we didn't realize at that point that we could go ahead and  
5 obtain additional information, e-mails between the defendant  
6 and Cheryl Hatzopoulos to further substantiate the rental of  
7 that residence, and then, of course, the ordering from that  
8 residence by computer of these books that have become an  
9 important topic in this case.

10           You know, it is an on-going example of  
11 continued investigative efforts, Judge, and quite frankly,  
12 these are diligent investigative efforts. Given the volume  
13 of materials that has been poured through by the Yavapai  
14 County Sheriff's Office in this case, it is totally  
15 understandable and explainable how these things occur.

16           In regard to Rene Gerard's phone records,  
17 the defendant and Rene Gerard in their jail phone calls,  
18 which have been disclosed to the defense, were using a secret  
19 code talking to each other. It then became apparent that  
20 maybe it would be necessary for the State to subpoena Rene  
21 Gerard's telephone records to see if we could somehow  
22 ascertain what this secret code was referring to. That is  
23 what necessitated the subpoena of Rene Gerard's phone  
24 records.

25           In terms of due diligence, this has been

1 an on-going diligent investigation from start to finish. I  
2 understand that there were substantial delays. That isn't as  
3 a result of a lack of diligence. And presumably, the  
4 defendant and Ms. Gerard knew what they were talking about  
5 when they communicated with each other by way of secret code.

6 Is there is a prejudice? I think not.

7 THE COURT: I guess I don't understand what  
8 you are seeking to have admitted under these various  
9 categories. Some accounts at J.P. Morgan Chase bank and some  
10 other bank accounts. What is disclosed that you are seeking  
11 to have admitted at trial?

12 MR. BUTNER: At this point in time, Judge, I  
13 don't know that there is anything that we are seeking to be  
14 admitted, other than that fact that we will now have complete  
15 records for these accounts, when it took us multiple  
16 subpoenas to get them. We have, basically, been able to  
17 establish what the account balances were by subpoenaing the  
18 records early on, but sometimes people want complete records  
19 to establish full account balances and have a complete  
20 understanding of what took place in that account. You know,  
21 that is typically an objection when you go to saying, when  
22 you have testimony concerning, well, his account balance was  
23 "X" number of dollars at this point in time. Do you have the  
24 complete records of that account? The problem was we didn't  
25 have, because the banks kept not sending complete records.

1 THE COURT: Gerard phone records, it says of  
2 activity between June 17th and 21st of '09.

3 MR. BUTNER: That's correct, Judge.

4 THE COURT: Are you seeking to admit that she  
5 made certain calls to certain other phone numbers?

6 MR. BUTNER: We were seeking to try and find  
7 out if she was involved in sending e-mails to Mr. Sears'  
8 office. We also believe that she was involved in some other  
9 kind of criminal activity connected to Mr. DeMocker, and they  
10 were communicating about this by way of secret code. And we  
11 didn't discover that this was actually a secret code until  
12 substantially later, when we figured out they were talking in  
13 secret code.

14 THE COURT: So, whether they are talking in  
15 secret code or not, how is that relevant in and of itself? I  
16 presume that you are trying to get some information of those  
17 records that there were some calls or communications of some  
18 kind between Miss Gerard and somebody of importance in the  
19 case.

20 MR. BUTNER: It appears as if there was  
21 communication between Ms. Gerard and Mr. DeMocker about  
22 Mr. DeMocker's initial plans to flee in this case. And  
23 Ms. Gerard was part of those plans to flee. And these  
24 records will help substantiate that, because they may lead to  
25 the discovery of physical evidence.

1 THE COURT: June 17th to 21st of '09?

2 MR. BUTNER: Yes. And they were communicating  
3 about that by way of secret code.

4 THE COURT: When were they obtained?

5 MR. BUTNER: The phone records?

6 THE COURT: Yes.

7 MR. BUTNER: I am looking to see when they  
8 were disclosed, Judge.

9 THE COURT: They are disclosed March of 2010,  
10 according to this. The question I had was when they were  
11 obtained.

12 MR. BUTNER: I believe that they were obtained  
13 within two weeks before that date, possibly even sooner than  
14 that.

15 THE COURT: More approximate to --

16 MR. BUTNER: More approximate to the  
17 disclosure date.

18 MS. CHAPMAN: Your Honor, if I may, the  
19 State's response indicates that they knew in mid-2009 about  
20 the investigation, which they think Miss Gerard may have been  
21 involved in sending that e-mail, and the State has been  
22 continuously reviewing telephone calls between Mr. DeMocker  
23 and Miss Gerard, even though they weren't disclosing those  
24 summaries to the defense until January of 2010. They were  
25 reviewing and summarizing those phone calls for themselves

1 concurrently since 2008.

2 THE COURT: Do you want to add anything on  
3 that point, Mr. Butner?

4 MR. BUTNER: Only that we still don't, Judge,  
5 at this point in time know what the secret code was, and we  
6 are still trying to find that out. We are still searching  
7 for that physical evidence that I was just describing.

8 THE COURT: What about the e-mails between  
9 info@enjoyPrescott and Mr. DeMocker? As I understand it, you  
10 are talking about some communication for purposes of property  
11 rental post the time of the homicide?

12 MR. BUTNER: I don't know exactly. The e-mail  
13 that I think that we are talking about is an e-mail that was  
14 sent during the pendency of this litigation from an internet  
15 cafe in Paradise Valley.

16 THE COURT: I am looking at the defense reply  
17 referring to Item 8.

18 MR. BUTNER: You mean the e-mail concerning  
19 the shoes?

20 THE COURT: No. It is the e-mail -- well, I  
21 don't know. It is No. 8 in the motion. It is No. 8 in the  
22 reply. It is e-mails between Mr. DeMocker, apparently, and  
23 in the State's possession since September of 2008, referring  
24 to a Cheryl and rental property.

25 MR. BUTNER: I understand now. I didn't

1 recognize the e-mail address. That is the Hatzopoulos e-mail  
2 where basically the defendant was ordering books using the  
3 e-mail address from a rental property in Prescott. And I  
4 must admit it took us a long time to figure that out and  
5 subpoena that particular information, Judge.

6 THE COURT: Are you referring to the books  
7 that were ultimately, apparently, located at the office from  
8 Amazon.

9 MR. BUTNER: Correct. That is my  
10 understanding, yes.

11 THE COURT: And the defense asserts that those  
12 e-mails were in the State's position since September of '08,  
13 even prior to the arrest of Mr. DeMocker.

14 MR. BUTNER: If that's the case, Judge, I  
15 don't quite understand what the prejudice would be about  
16 that, and they were disclosed at that point in time, too,  
17 promptly in connection with this case early on.

18 THE COURT: They are saying that it wasn't  
19 disclosed, that it was not disclosed until March, but was in  
20 possession of the county sheriff's office September of '08.

21 MR. BUTNER: Yes. They were possession of a  
22 detective that apparently had not provided the actual  
23 e-mails. We were just aware that the purchase had been done  
24 by way of e-mail.

25 THE COURT: And tell me why is that

1 significant to the State's case as far as the e-mails between  
2 Mr. DeMocker and info@enjoy as distinguished from the e-mails  
3 that pertain to the actual ordering of the materials.

4 MR. BUTNER: I don't know. I don't know. I  
5 give up. I don't know why detective -- the detective that  
6 had those kept them in his possession, Judge, and --

7 THE COURT: I think I understand the import of  
8 the Outdoor ProLink information.

9 MR. BUTNER: Right.

10 THE COURT: And the bank account. All right.

11 Miss Chapman, anything else after my  
12 questions with Mr. Butner?

13 MS. CHAPMAN: Your Honor, I guess the only  
14 thing I would add is the State seems to be shifting the  
15 burden here with respect to what Mr. DeMocker may have known  
16 or didn't know. It is the State's burden to make the  
17 disclosure it going to make in a timely manner, perform its  
18 investigation with due diligence and disclose information  
19 that it intends to use in a timely manner to Mr. DeMocker  
20 under both the Court's orders and 15.1.

21 It is pretty clear both from the State's  
22 response and from Mr. Butner's remarks that the State didn't  
23 do that, hasn't done it, and in most cases doesn't know why.  
24 And it is also pretty clear that the prejudice to  
25 Mr. DeMocker isn't that Mr. DeMocker and his defense team

1     couldn't have gone out and requested every bank record that  
2     Mr. DeMocker has from 2003 to the present that it didn't know  
3     that the State needed or wanted, or was going to request or  
4     had requested, didn't receive, but that the State didn't do  
5     it and didn't disclose it to the defense, and now the defense  
6     is left with a few weeks before trial trying to scramble  
7     together to make sense of what the State is disclosing in  
8     tens of thousands of pages of disclosure.

9                     And, you know, the State has known about  
10    this information in most cases for over a year. Most of the  
11    bank accounts were known to the State in 2008. The  
12    disclosures were not made until March.

13                    With respect to the jail phone calls, the  
14    State was concurrently reviewing those calls. And again,  
15    it's response indicates it was aware of these e-mails in June  
16    of 2009. It didn't do anything about them until March of  
17    2010. The *Gilkerson* report that it mentioned is a new  
18    report. It has to do with an exemplar shoe that the defense  
19    can't go out and purchase because the shoes aren't created  
20    anymore, that the defense wasn't provided, in terms of an  
21    exemplar shoe, an examination that the defense is incapable  
22    of doing.

23                    So all of those things put the defense in  
24    the position of not being able to evaluate the information  
25    the State is providing, not being able to perform

1 examinations or investigation that the State is able to  
2 perform, not being able to evaluate the State's examination  
3 that the State is performing because we simply don't have  
4 enough time. The manner of the State's investigation, the  
5 manner of the State's disclosure in this case has made it so  
6 that the defense can't respond to the State's investigation,  
7 can't perform its own evaluation, and the State has provided  
8 no excuse, other than, well, we just don't know. We don't  
9 know how we want to use the information, we don't know if we  
10 want to use the information and we don't know why we late  
11 disclosed it. All we know is maybe Mr. DeMocker also knew  
12 about it, and that is simply not sufficient. It is not  
13 constitutionally sufficient. It is not sufficient under the  
14 rules. And it is not sufficient under your own orders about  
15 requiring disclosure.

16 If the State is provided to simply say,  
17 well, you know, we do the best we can, then the defendant  
18 essentially isn't entitled to a constitutional right to  
19 confront the evidence and prepare for trial and to due  
20 process. That is what is happening here. That is the  
21 State's position. We are doing the best we can. That is  
22 constitutionally sufficient. And it is not.

23 We are not able to prepare. We are not  
24 able to confront the evidence. We are not able to conduct  
25 our own investigation, and it is precisely because the State

1 has not done what they are obligated to do. We are asking  
2 you to preclude this late disclosed evidence on that basis.  
3 There is nothing new about this information, other than the  
4 State is finally getting around to doing what it should have  
5 done months ago, and in some cases over a year ago.

6 THE COURT: Did you want to address the Cooper  
7 matters separately under 702, other than preclusion? Or do  
8 you want to save that for a later time?

9 MS. CHAPMAN: I am ready to do the 702 matter,  
10 Your Honor.

11 I also wanted to take up with respect to  
12 we have also asked Your Honor to dismiss the death penalty as  
13 a sanction for the cumulative effect of the late disclosure.  
14 I think it is helpful to define what we are not talking about  
15 here. We are not talking about newly discovered evidence.  
16 We are not talking about tests that the State just learned  
17 needed to be performed. We are not talking about subject  
18 matters that the State just learned were at issue. We are  
19 not talking about examinations that the State just learned  
20 about as a surprise that needed to be done. And we are not  
21 talking about the State's duty to investigate this case. We  
22 are talking about the State's duty of due diligence and the  
23 State's duty to do what should have been done 15 months ago.

24 And if the State can come into this  
25 courtroom and rely on the fact that they have a duty to

1 investigate, to excuse their obligation to do what they  
2 should have done 15 months ago, there simply is never an  
3 opportunity for this court or any court to sanction for their  
4 failure to comply with the disclosure obligations.

5                   What we are talking about here are  
6 evidence and facts that have been in the State's possession  
7 in some cases for well over a year, and in some cases for  
8 over 15 months. Tests it knew it should have performed or  
9 were advised by DPS that it should have been performed,  
10 needed to be performed, in some cases in August of 2008.  
11 Subject matters that it was aware were issues early on in the  
12 case; crime scene, for example, and with the subject matter  
13 of Mr. Cooper; documents and evidence that the defense  
14 repeatedly requested and were told did not exist in the form  
15 of crime scene diagrams, and also in the form of cell tower  
16 evidence; examinations of items of evidence that the State  
17 seized in July of 2008, but didn't ask for examinations to be  
18 performed until February and March of 2010 with less than  
19 two -- or in this case, less than a month to trial; experts  
20 in areas for whom we have no reports, with less than one  
21 month to trial; reports and witnesses that were withheld for  
22 months at a time, and no explanation for the failures of the  
23 State where the State is seeking the death penalty.

24                   We have been filing our motion as soon as  
25 we receive the late disclosures. It has been on-going. We

1 let the State know when we know when the State had this  
2 evidence and when they are disclosing it. And we also  
3 outlined the prejudice to the Court. We haven't been able to  
4 review the tens of thousands of pages of late disclosure. In  
5 the past month it has been tens of thousands of pages, in the  
6 last month. We, as we talked about, received over 70,000  
7 from the D.P.S. computer forensic lab in the last several  
8 weeks, and this information apparently isn't complete. We  
9 continue to receive disclosure.

10 We haven't been able to hire the experts  
11 that we need to evaluate the State's examination. The  
12 experts we do have haven't been able to review the  
13 information that has been provided. We aren't prepared to  
14 confront their evidence. We are not prepared to interview  
15 their experts. We don't have reports, and we are in the  
16 middle of jury selection. We don't have any way to prepare  
17 for this testimony, and the forensic testing is on-going. We  
18 are awaiting forensic testing as we sit here today, and their  
19 disclosure has literally crippled our ability to prepare.

20 We have talked to you about the  
21 requirements under 15.7 for imposing the sanction, and  
22 sanctions are mandatory unless you find either that the  
23 information could not be disclosed with due diligence or that  
24 it was disclosed immediately upon discovery or that the  
25 State's failure to comply was harmless. And neither of those

1 findings is possible.

2 We know that these could have been  
3 disclosed with due diligence and State has failed to provide  
4 any explanation for their failure to exercise that due  
5 diligence, and we have explained in countless motions and  
6 before you today what the prejudice has been.

7 The rule itself contemplates the  
8 preclusion of witnesses and evidence. You have set  
9 deadlines, the rule set deadlines, and they have been ignored  
10 repeatedly. We understand that preclusion is not a favored  
11 sanction. We cited you to the *Chrono* case and the *Moody*  
12 case. And the cumulative and on-going nature of the  
13 disclosure violations is another relevant circumstance for  
14 you to consider when you are determining a sanction. The  
15 State hasn't proposed any alternative sanction for you to  
16 consider, and they have offered no rationale or excuse or  
17 their failure to do what they are required to do.

18 Your Honor, at one of the last times we  
19 talked about a sanction under 15.7, talked about imposing a  
20 sanction that is least disruptive to the parties'  
21 presentation of the case. And one of the things when we were  
22 considering that and what sanctions to propose to Your Honor  
23 that we thought about was what affect dismissing the death  
24 penalty would have. The State would still be able to seek a  
25 life sentence against Mr. DeMocker. And other than that, the

1 presentation of the State's case would remain unchanged. And  
2 that sanction would have, at least in part, an ameliorative  
3 effect on the repeated on-going and cumulative nature of the  
4 disclosure violations here.

5 This also accounts for the death is  
6 different jurisprudence that we cited repeatedly to Your  
7 Honor that the courts are to take extraordinary measures to  
8 make sure that death is not imposed as a result of mistake or  
9 passion or prejudice or whimsy. We think that takes the  
10 count to the requirement that an elevated level of due  
11 process is required. We don't think that what's happened  
12 here in terms of the State's failure to comply with the rules  
13 and Court's orders and, frankly, the constitutional  
14 obligations that are behind those orders and those rules  
15 meets that heightened level of due process.

16 We have cited Your Honor to *Barrs versus*  
17 *Wilkenson* which talks about the dismissal of the death  
18 penalty as a sanction for late notice. And we think, you  
19 know, Your Honor, the State does have the duty to continue to  
20 investigate the case, and the defense possibly more than the  
21 State in this case has an interest in that. But the State  
22 has an equal, if not greater, duty to exercise due diligence,  
23 which it just hasn't done in this case.

24 They can't be excused from complying with  
25 their disclosure obligations by simply waiting until the last

1 few weeks before trial in a death penalty case to do what  
2 they should have done months ago. And we are asking to  
3 dismiss the death penalty in this case to address the  
4 cumulative and on-going nature of these violations so that we  
5 can move forward. That is the sanction that doesn't have a  
6 tremendous impact on the presentation of their case. It also  
7 acknowledges their repeated failure to do what you ordered  
8 them to do and what the rules order them to do and what the  
9 constitution, frankly, requires them to do.

10 MR. BUTNER: Judge, if I might.

11 THE COURT: Please.

12 MR. BUTNER: Judge, you know, the defense has  
13 repeatedly urged the Court to employ Rule 15.7 and the  
14 sanctions contained therein. I draw the Court's attention to  
15 the fact that under subsection (B) every motion for sanction  
16 should be accompanied by a certification attached of moving  
17 counsel after personal consultation and good faith efforts to  
18 do so having been unable to satisfactorily resolve the  
19 matter, and there is no such certification attached to any of  
20 these motions.

21 Now, in regard to the State's efforts to  
22 comply with the disclosure requests of the defense, and  
23 having done so, Judge, look at the on-going disclosure that  
24 has been provided in this case from day one, the thousands  
25 and thousands and thousands of pages of documents; the disks,

1 the audios, et cetera. The State has made every effort to  
2 comply with disclosure in this case.

3 The Hatzopoulos e-mails are an example  
4 of, sure, an omission by the State. A detective that was  
5 very peripherally involved with this case had these e-mails  
6 that took place between the defendant and Hatzopoulos renting  
7 that particular premises, and we didn't disclose them. If  
8 the Court orders that we can't use them, so be it, we can't  
9 use them. But the fact of the matter is that those were  
10 e-mails by the defendant with Miss Hatzopoulos, and so  
11 presumably he was aware of what he had done in that regard.

12 And in regard to the ProLink information,  
13 all of these steps were taken immediately upon discovery that  
14 they were of any kind of significance and were promptly  
15 disclosed. And that goes back to the date of discovery that  
16 the shoe prints match, so to speak, or closely or comparable  
17 to, I guess would be a better way to phrase it, the shoe  
18 prints were closely comparable to La Sportiva type shoes.  
19 All of that information was promptly disclosed by the State.

20 It has been difficult in this case to  
21 keep up with the disclosure, but I think that the State has  
22 demonstrated, if through no other way, by the sheer volume of  
23 the disclosure that has been on-going in this case and will  
24 continue to take place.

25 MS. CHAPMAN: Your Honor, I am sorry, just to

1 if I might deal with this 15.7(B), we did file a motion to  
2 compel that outlined the repeated letters to Mr. Butner and  
3 his failure to respond and our attempts to contact him and  
4 efforts to resolve our requests for information. So, I think  
5 that complies with at least the spirit if not the rule and  
6 letter of Rule 15.7(B).

7 THE COURT: Mr. Butner, I was not sure you  
8 were done.

9 MR. BUTNER: I am done, Judge, at least for  
10 right now.

11 THE COURT: Part of what Rule 15.7 is talking  
12 about, also, is for the Court to consider whether there is  
13 prejudice, whether the failure to comply was harmless,  
14 whether there is opportunity to disclose earlier even with  
15 due diligence, and any orders with regard to sanctions have  
16 to take in the significance of the information, the impact of  
17 the sanction on the party, on the victim, the stage of the  
18 proceedings when the disclosure is ultimately made. And then  
19 they set forth a whole variety of possible sanctions, which  
20 both counsel have correctly pointed out disfavors dismissal  
21 of the case, disfavors preclusion of witnesses or evidence,  
22 doesn't say you can't ever grant those, but it indicates that  
23 the Court is supposed to try to apply sanctions that are not  
24 going to affect the evidence at trial, the merits of the  
25 case.

1                   That is part of the discussion in  
2     *Wilkenson*, the *Barrs versus Wilkenson* case, talking about,  
3     well, sanctions that affect the sentencing are not sanctions  
4     that affect the trial, the merits of the case, which is part  
5     of the rationale of why the Court thought of that as a  
6     possible sanction available to the courts, because 15.7 is  
7     talking about available sanctions include but are not limited  
8     to precluding -- preclusion is authorized. It is the first  
9     one they even list. And dismissal is authorized. It is the  
10    second one they list. But then the case law goes on to say  
11    that those are not favored. They don't say that you can  
12    never grant those, but they urge the trial courts to look at  
13    other possibilities.

14                   Granting a continuance is a possibility,  
15    or declaring a mistrial in the interest of justice, holding a  
16    witness, party, person or counsel in contempt, imposing  
17    costs. We have had, I think it was the *Meza* case, M-E-Z-A  
18    for the court reporter, the *Meza* case that is talking about  
19    sanctions, costs imposed on the prosecutor in that case,  
20    attorney fees, I think. And then it has costs of continuing  
21    the proceeding, and many other appropriate sanctions.

22                   So, there is a whole variety of possible  
23    sanctions limited, I suppose, only by imagination but the  
24    courts are also needful, I think, to have the parties address  
25    the significance of the information, what sanctions you

1 think, if any, may apply if it is not preclusion. I want to  
2 make sure that both sides have an opportunity for that.

3 So, Mr. Butner.

4 MR. BUTNER: Well, Judge, there are other  
5 alternatives besides preclusion. In some instances, I think  
6 preclusion may be warranted, and I am talking about, quite  
7 frankly, the Hatzopoulos e-mails. I can't come up with a  
8 reason or a good excuse as to why those were not disclosed a  
9 long time ago.

10 But other things that affect the case  
11 much more profoundly, such as the shoe print evidence and so  
12 forth, I don't think that is appropriate. Probably the best  
13 remedy would be a continuance of the trial date in order for  
14 the defense to get their shoe print expert in place in this  
15 case, and I am really not sure if they don't already have  
16 such an expert. But these things were disclosed as soon as  
17 it became apparent that this was significant evidence, had  
18 something really to do with the case and changed it, rather  
19 than simply evidence of non-matching shoes and continuing to  
20 be investigated by the State.

21 So probably an appropriate remedy in this  
22 case might be a continuance of the case, if necessary. And  
23 even in the most extreme situation, maybe even possibly a  
24 modification of the defendant's release conditions.

25 THE COURT: The issue with regard to

1 continuances is that, I think, reflected in the *Barrs*  
2 language about continuance may be an appropriate remedy for a  
3 violation, but the problem is that sometimes continuances as  
4 was noted by the majority in *Barrs*, I think it was -- I  
5 think, if I recall right, that was a unanimous decision of  
6 the panel -- it says trial judges should bare in mind that  
7 postponements can complicate already congested calendars, and  
8 don't I know that part of it, but it also said, quote, may  
9 actually reward wrongdoers by providing additional  
10 preparation time, close quote, and it references the *Scott*  
11 case, 24 Arizona Appeals at 205.

12 That is the troubling part. When you set  
13 a trial date on May 12 of 2009 for May 4 of 2010, and we are  
14 within a month of that and have begun, as both of you have  
15 acknowledged, I think, the preparation for impaneling a jury  
16 by having the jury fill out the questionnaires. I don't know  
17 that that is an appropriate or effective sanction.

18 The release issue is an available  
19 sanction, also. I think the defendant could be released, but  
20 that one has a number of concerns for the Court, which I  
21 think I have expressed in previous hearings.

22 I saw and read and tend to agree with  
23 Judge Phil Hall in his dissent in the *Meza* case, the majority  
24 essentially assessed attorney fees against the prosecutor  
25 who -- the language that Judge Hall used in the dissent was,

1 it makes good sense to hold prosecutors responsible for  
2 insuring that relevant information in the possession of law  
3 enforcement agencies is disclosed by imposing the sanction of  
4 preclusion. For non-disclosure of evidence preclusion is  
5 justified as a tool to encourage prosecutors to develop  
6 policies to ensure the flow of discoverable information to  
7 their offices from local law enforcement agencies, citing the  
8 Carpenter case. And maybe that pertains to the e-mails that  
9 were referenced but not disclosed until recently from the  
10 unpronounceable witness.

11 Judge Hall goes on to say it is quite  
12 another thing to assess attorney fees against a prosecutor  
13 who makes a diligent good faith effort to comply with Rule  
14 15.1, but who is frustrated in his or her efforts by the  
15 conduct of the law enforcement agency that is not directly  
16 answerable to the prosecutor. Under such circumstances the  
17 search for truth, the ultimate goal of Rule 15 reciprocal  
18 disclosure requirements, is not advanced by awarding attorney  
19 fees. And it goes on from there, that I choose not -- I  
20 acknowledge is in there, but I choose not to read into the  
21 record.

22 So, I am going to consider this further  
23 overnight, and I will talk to you about it in the morning, I  
24 think, further. We have about a half an hour left. I  
25 appreciate your observations with regard to the effect on the

1 case of the various items that we have talked about and what  
2 you think has been or hasn't been diligence on the part of  
3 the State agents, either in the County Attorney's office or  
4 Yavapai County Sheriff's Office or elsewhere.

5 Do you have another one that may take a  
6 few minutes not after 5:00?

7 MS. CHAPMAN: The two that I think are left  
8 that are properly keyed up would be the Cooper, which I think  
9 may take slightly longer than that, and then there was the  
10 motion based on the -- to preclude witnesses, for attorney's  
11 fees or other sanctions, based on the witness interviews of  
12 the witnesses who aren't really witnesses that was filed on  
13 February 26. And that is Mr. Sears' motion. I am not sure  
14 how long that will take, but --

15 THE COURT: I am trying to find that one.

16 MS. CHAPMAN: Filed on February 26, motion to  
17 preclude witnesses for attorney's fees and other sanctions  
18 including dismissal of the death penalty.

19 THE COURT: Well, I am not putting my finger  
20 on that one right now. I will acknowledge not having brought  
21 down the whole file.

22 MR. SEARS: Do you want our copy, Your Honor?

23 THE COURT: If you have an extra. So that my  
24 comment is explained in the record, we are in a courtroom  
25 that is different than my own. The rest of the file is

1 upstairs. We are in Judge Hess' courtroom downstairs.

2 MR. SEARS: Judge, this is from our file.  
3 That is our motion, State's response and our reply, which I  
4 have committed to memory.

5 THE COURT: This kind of goes along with what  
6 we were discussing in terms of sanctions, so it makes some  
7 sense. Go ahead.

8 MR. SEARS: Judge, this does in some respects  
9 really summarize at least part of the problem that  
10 Ms. Chapman has spoken about at such length this afternoon.  
11 This was a particularly annoying set of circumstances in  
12 which we set up in good faith interviews of witness that were  
13 on the State's lengthy witness list, conducted them. It was  
14 clear that the witnesses, from almost the very beginning of  
15 these interviews which were conducted by Mr. Robertson and  
16 me, had no involvement in this case, no meaningful  
17 involvement. For example, Captain Francis' involvement was  
18 to come out and see if anybody needed any water or food at  
19 the crime scene. He was on the State's witness list in this  
20 case.

21 And so we spent time. The State's  
22 response is, basically, we are crying foul. We shouldn't be  
23 upset because these are only a couple of witnesses and  
24 undisclosed police report. The issue is this didn't just  
25 happen in a vacuum. This is in the context of everything

1 else that was happening in this case and that has been  
2 happening really almost since the first of this year.

3 And my observation has been, and I  
4 pointed this out to the Court on more than one occasion, that  
5 something seemed to change in the way in which the State  
6 proceeded in this case after the round of January hearings.  
7 And the State began with the shoe print evidence at the end  
8 of January and any number of places, sending people out,  
9 sending Sergeant Winslow out to redo the work because his  
10 testimony to us in a defense interview was at odds with other  
11 police officers who were at the scene doing the same thing.  
12 So he provides an essentially an amended report saying, I  
13 guess I was wrong. Here is the new information.

14 The problem that we have had -- this is  
15 my perspective, which is slightly different than  
16 Miss Chapman's, because I have been responsible, largely, for  
17 doing the witness interviews in this case thus far, is that  
18 because of the constellation of circumstances, the State's  
19 failure in any meaningful way to narrow and turn into a real  
20 document, a witness list, this constant late disclosure and  
21 the rest, we are not only unable to do new work, we are  
22 wasting our time doing work that we should not have been  
23 required to do in the first instance.

24 Whether or not it is appropriate under  
25 the descent in the *Meza* case, which frankly, I like, too. I

1 am interested that you looked at that, because I think that  
2 was a very thoughtful idea. As much as I think there are  
3 cases in which punitive and monetary sanctions against  
4 prosecutors might be warranted, I am not necessarily  
5 convinced that in a vacuum these violations would be such a  
6 case.

7                   However, the question has arisen, and you  
8 have heard from Mr. Butner and Ms. Chapman repeatedly, about  
9 what among the panoply of sanctions that are listed in 15.7  
10 would make sense for the various discovery violations in this  
11 case. Here is my view, Your Honor. That with respect to the  
12 computer forensic information and with respect to the shoe  
13 print information, no matter how you slice it, preclusion  
14 really seems to be the only remedy that would protect the  
15 defendant's right to a fair trial and effective assistance of  
16 counsel under the constitution and demonstrate to the  
17 prosecution that these are not suggestions from the Court,  
18 these are not the Supreme Court recommendations for criminal  
19 procedure, these are rules and orders that have to apply.

20                   I can promise you that if we were in the  
21 same position and the State were filing these motions, you  
22 can be certain that the State would come down on us like a  
23 ton of bricks in front of you as often as possible saying we  
24 are dragging our feet, we don't want to go the trial, delay,  
25 delay, delay. And, frankly, I think that is everyone's

1 collective experience in criminal defense cases that it is  
2 frequently the defendant at last minute that wants to do  
3 something to stop the train from leaving the station.

4 This feels very different to me. This  
5 feels very much like the State, looking at their case a  
6 couple of months out, realizing how much of their case was  
7 not done, was not prepared. Whose fault it is or why it  
8 happened is really not my concern. The reality is they have  
9 tried to compress in the last 60 to 90 days all the work  
10 disclosure and the like that should have been done and could  
11 have been done months and months ago, now even years ago,  
12 with no excuse other than it just didn't get done. But the  
13 problem is that even though the State may have this  
14 continuing obligation to investigate new matters, the more  
15 important part this for our consideration, I think, is what  
16 is the State's obligation under the rules and the  
17 constitution to the defendant and the Court with respect to  
18 disclosure of matters that have already been investigated or,  
19 as in most cases today, were well within their knowledge and  
20 control for many months before they were turned over to the  
21 defense.

22 That is how we get to the problem that we  
23 have reached today, which is that four weeks or less from  
24 trial, we have 23,000 UBS e-mails that we, honestly, would  
25 have to review if you let them use one of the e-mails that

1 they propose. There is no way that we can effectively  
2 represent our client under the Sixth Amendment without doing  
3 that. We can't just take the chance that there is nothing  
4 else among those e-mails that would support this.

5 We can't respond in any meaningful way to  
6 the 8500 pages of D.P.S. records. We can't respond to the  
7 late shoe print evidence for all the reason that Ms. Chapman  
8 said. Nor should we have to, nor should Steve DeMocker a  
9 month out from a trial for his life have to be in the  
10 position that Mr. Butner would have the defense is, which is  
11 oh, he knows what he did. He can just tell his team where to  
12 look and what to do. That shifts the burden of proof, and it  
13 shifts the requirements of disclosure under Rule 15 and the  
14 orders of this Court from the State, where it belongs, to the  
15 defendant, where it does not belong in this case.

16 The shoe print evidence is particularly  
17 troubling, because I think as the Court has come to see, this  
18 was a *Brady* issue of the clearest sort all Fall and into the  
19 early part of this year. The State's interpretation of *Brady*  
20 is really twisted. The State's interpretation of *Brady* is  
21 that it is not *Brady* unless and until we can make it look bad  
22 for the defendant, or it is inescapably good for the  
23 defendant and we are forced to turn it over.

24 This is a very hot topic in the criminal  
25 defense bar on both sides. I am sure the Court knows that.

1 Our monthly magazine from the National Association of  
2 Criminal Defense Lawyers, this month is all about failure to  
3 disclose and *Brady* and model rule 3.8, which is very similar  
4 to Arizona Rule 15.7 that codifies *Brady*.

5 Just because of the *Brady* violation in  
6 this case, I would submit just because we lost five months  
7 and litigated a matter which the State knew had evidence in  
8 its possession that would have changed the format, the  
9 January arguments and the shoe prints, would have changed  
10 what we said, would have changed how we proceeded in this  
11 case, the prejudice to the defendant by that *Brady* violation  
12 would warrant, I submit, preclusion of evidence on its own.  
13 But it is made worse now by this late disclosure of what the  
14 State touts as pivotal evidence, crucial evidence, critical  
15 evidence. But in reality, based on this disclosure that we  
16 have just gotten, the evidence is still equivocal.

17 The State has essentially represented to  
18 you today that they now have shoe print impression evidence  
19 from these bad photographs at the crime scene that  
20 essentially match up to a pair of shoes that Mr. DeMocker  
21 ordered in 2006. They have not paid much attention to the  
22 fact that this crime occurred in 2008, and that the shoes  
23 have never been recovered. What they want to argue to the  
24 jury, if permitted, is that somehow they are in the burn bag  
25 with the golf club and the gloves and coveralls and

1 everything else that Mr. DeMocker supposedly used in the  
2 commission of this crime and disposed of.

3 On further examination, this latest  
4 report dated 3/23/10, less than two weeks ago, from  
5 Mr. Gilkerson of the FBI is equivocal. It uses phrases like  
6 "could be," "most likely to be," "closest to." It doesn't  
7 say "match." It doesn't say anything approximating a match.  
8 That means if the State wants to us that, we are going to be  
9 in a maelstrom of work necessary to understand exactly what  
10 Mr. Gilkerson would say if called as a witness in this case,  
11 how the State would try to use that evidence, and what the  
12 true state of the evidence is, what the basis for this  
13 less-than-two-week-old opinion is on this case.

14 When you take the *Brady* violation that  
15 led us to the shoe print evidence, and then you superimpose  
16 that on this late disclosed evidence so close to trial of  
17 matters which the State could have investigated and done the  
18 work on in September or October or probably even in April of  
19 2009, puts the defendant in an impossible position when he is  
20 on trial for his life. The more the State hangs its hat on  
21 this evidence and points to it as being important to try to  
22 persuade you not to preclude it, the more it becomes obvious  
23 to us on the defense side that this is important evidence  
24 that needs further investigation.

25 But the Court is right, that a

1 continuance, with Mr. DeMocker sitting in jail, rewards their  
2 wrongdoing in this case, gives them more time to pull we  
3 don't know what else out of their hat, and put us in the same  
4 position. If they are given six months or nine months more  
5 to get ready for trial, who knows where this investigation is  
6 going to go from the State. We just have no sense at this  
7 point that we will ever be in position where we can fully and  
8 completely understand and appreciate the State's case and  
9 confront it under the Sixth Amendment. That is what this is  
10 really all about. That is what this discussion is really all  
11 about.

12 So, with respect to all of this computer  
13 information of all types, whether it is the forensic  
14 information or UBS information and the shoe print evidence,  
15 we don't see another remedy besides preclusion. We don't see  
16 another way --

17 THE COURT: I thought what we were talking  
18 about was your February 26 motion, and that is asking for  
19 something other than preclusion.

20 MR. SEARS: It is. It asks for attorney fees.  
21 I will be candid with the Court. When I filed that motion, I  
22 was upset. I had just wasted my time, which is in sort  
23 supply, just like the Court's time and Mr. Butner's time  
24 during this, and I thought an award of attorney fees and  
25 costs makes sense. If the Court thinks that the descent in

1 Meza points away from that, I can't argue seriously with you.  
2 I wouldn't be candid with you if I told you we had to have  
3 that.

4 But, this is the last point I want to  
5 make, what about death penalty? What about striking the  
6 death penalty in this case? What I am winding up to say  
7 here, Your Honor, is that other than the shoe print evidence  
8 and everything connected with it, and the computer forensic  
9 evidence and everything connected with it, with respect to  
10 the other evidence, as prejudicial as it is and as burdensome  
11 as it is, we think that on balance striking the death penalty  
12 leaves the State's case in tact with respect to that late  
13 disclosed evidence.

14 I suggest to all concerned that there  
15 will be an on-going difficult battle about its admissibility,  
16 about its relevance and about all of those other matters and  
17 whether it is consistent with prior orders of the Court. But  
18 striking the death penalty in this case would change the  
19 sentencing options available to the State and nothing more in  
20 this case. But it would send a message, as we are prone to  
21 say when we are sentencing people in criminal cases or for  
22 entering orders in discovery disputes like this, it would  
23 simply send a message that would let the State know what  
24 happened and why it happened, would protect Mr. DeMocker's  
25 right, but wouldn't cripple that part of the State's case.

1                   But I do not see the death penalty alone  
2 as an appropriate sanction to remedy all of this, because  
3 that leaves us in the impossible, unfairly prejudicial  
4 position with respect to the evidence that is so difficult to  
5 rebut, that is so difficult to rebut. And if you were asking  
6 me for my separate opinion in connection with this motion,  
7 that is what I would suggest as a remedy across the board.  
8 Taking money out of Mr. Butner's paycheck is not something I  
9 would want to do in this case. When I filed the motion, we  
10 cited the court to *Meza*, which says that is an option. I was  
11 just upset enough that I thought on that day, on February  
12 26th, that that was appropriate. But today, I think we need  
13 to look at the big picture. That is what we see the big  
14 picture is, Judge.

15                   There are certain parts of this discovery  
16 problem that are insoluble, as far as we are concerned.  
17 There is just nothing short of preclusion that would help us  
18 out here that makes any sense.

19                   With respect to the other discovery  
20 violations, something has to be done. There has to be some  
21 sanction imposed, or we are back to the suggestion of  
22 criminal procedures. If the rules and Court's orders are to  
23 have any meaning and effect at all, that is a sanction worth  
24 considering. That is where I would ask you to look, Your  
25 Honor.

1 THE COURT: Meza says costs and fees are one  
2 of the sanctions.

3 MR. SEARS: If somebody wants to write me a  
4 check, I suppose I will cash it, Your Honor.

5 THE COURT: Mr. Butner.

6 MR. BUTNER: Judge, this motion is about the  
7 interviews of Captain Francis and the animal control officer  
8 Mr. Potts, and also about Jimmy Jarrell. And as Mr. Sears  
9 points out in his motion, he began the interview of Jimmy  
10 Jarrell and basically didn't finish the interview, because  
11 Mr. Jarrell had not provided his reports and so forth. Of  
12 course, those will be provided, if they haven't already been  
13 provided prior to the completion of his interview.

14 You know, you have the supervising  
15 captain at a crime scene, and quite frankly, I feel that it  
16 is necessary to list that person as a witness in the event  
17 that there is a problem with people that are under his  
18 command that have not done something and he is accountable  
19 for that. And so I still think it was necessary to list him  
20 as a witness.

21 Similarly, this is a strange case where  
22 we have a couple of little dogs involved, and the issue of  
23 what happened to those little dogs. My understanding was  
24 that it was left in the hands of the animal control officer,  
25 and apparently, of course, they were taken away from the

1 scene. Not by the animal control officer, but by neighbors.  
2 Nevertheless, I think that it is appropriate to demonstrate  
3 that the animal control officer was called to the scene.  
4 People have a special sensitivity when it comes to animals in  
5 the State of Arizona, if not everywhere these days, and to  
6 make sure that they were appropriately cared for. I didn't  
7 realize that either one of these witnesses had so little to  
8 do with this case as it turned out in their interviews. And,  
9 of course, all reports that had anything to do with the case  
10 in connection with those activities had previously been  
11 disclosed. That is not the case with regard to Detective  
12 Jarrell and his reports. And basically, they should have  
13 been provided prior to the time of his interview.

14 I was in attendance at part of those  
15 interviews, and what happened and what resulted in Mr. Sears  
16 ending up wasting a bunch of his time, was that there was an  
17 officer-involved shooting up in the Ashfork area, and people  
18 that were going to be at those interviews got called away.  
19 And what would have turned out to be, boom, you know, Captain  
20 Francis doesn't have much to do with this case, and similarly  
21 Mr. Potts doesn't have much to do with this case, you know,  
22 we would have moved on to more productive matters. That  
23 isn't what happened because the officers that were also  
24 scheduled were taken away.

25 So I understand Mr. Sears' frustration,

1 but this was one of those things where the people that would  
2 have been productive in their interviews had been called away  
3 for an officer-involved shooting, or were called away right  
4 at the time Mr. Sears was there. In fact, I talked to John  
5 about that while he was there. I think he probably remembers  
6 that.

7 That is basically all I have to state  
8 about that.

9 MR. SEARS: I think, Your Honor, you will see  
10 that I raise no complaint about being unable to interview  
11 witnesses who were called away on another case. That is not  
12 what this is about.

13 THE COURT: Let me return your matters to you.

14 MR. SEARS: Here's what I think happened. I'm  
15 sure you remember from your days in that office, that often  
16 times in disclosure persons other than attorneys prepare the  
17 disclosure list from police reports and start pulling out  
18 names.

19 THE COURT: I don't remember that.

20 MR. SEARS: Maybe you were more on top of  
21 that. But it seems like the listing of people, particularly  
22 at the beginning of this case, and the list that we get is  
23 cumulative. It is like a chain letter. They repeat all the  
24 people at each disclosure and add new names in bold. That is  
25 what we get.

1 THE COURT: Right.

2 MR. SEARS: This is part of the problem.

3 Again, I am not asking for personal sanctions against  
4 Mr. Butner, but this is part of -- maybe in some ways an  
5 illustration of a larger problem, which is if you don't know  
6 your case, if you don't know what your witness will say, why  
7 they are witnesses, why they are there, then these kinds of  
8 things will happen. This was a particularly bad day when all  
9 of that happened at the same time, witness against witness.  
10 I am not saying it can't happen every now and again, but this  
11 was a day in which the people we were able to talk to one  
12 after the other knew nothing about the case and had nothing  
13 to do about the case. I don't think for a second it is  
14 important or relevant or even logical for the State to call a  
15 a dog control officer who got there after the dogs had been  
16 removed, or Captain Francis whose sole responsibility was not  
17 to supervise people but forced to see if anybody was hungry  
18 or thirsty, to call them as witnesses. And to put a witness  
19 out for an interview where the State concedes, correctly I  
20 think and candidly, that that witness was sitting on a report  
21 which had never been disclosed which would have been  
22 important for us to have in advance. The State has seen how  
23 we prepare for these interviews. They have seen the  
24 materials we bring with them. We don't just show up and ask  
25 them what they did. We come in with a focused interview

1 based on our review of the materials provided us about that  
2 witness in disclosure from a data base that we have created  
3 at great trouble and expense. We wasted that whole day  
4 there.

5 So, I think that although on the great  
6 scheme of things --

7 THE COURT: What amount of time was wasted?

8 MR. SEARS: Probably close to two hours. I  
9 could go back and look at my billing records.

10 Mr. Robertson conducted the interview of  
11 Detective Jarrell alone. I was not there for that. He bills  
12 at an hourly rate. And then, of course, all of the time for  
13 our paralegals to assemble the witness books for that and the  
14 time I spent reviewing that. So, there is the typical kind  
15 of time that you would have in preparation and actually  
16 conducting the interviews, and of course, the time for the  
17 motion.

18 MR. BUTNER: Judge, I point out that there  
19 were eight interviews scheduled for that date. And those  
20 people were not --

21 THE COURT: Not just three?

22 MR. BUTNER: Right. Those people were pulled  
23 away as a result of that shooting.

24 THE COURT: I guess I am not convinced that it  
25 was done in bad faith substantively. I think an award of

1 attorneys fees is applicable. So I am going to deny this  
2 particular motion.

3 Before we leave today, however, I have a  
4 petition, and maybe you can cover it in the couple of minutes  
5 we have. See what positions you may have with regard to  
6 this. I have a combination of documents filed April 1st and  
7 April 2nd of 2010, and whether you think this is something  
8 that I can address without Mr. Napper here.

9 I have a petition for use immunity with  
10 regard to Rene Gerard testifying at trial. I have a notice  
11 of appearance and request for notice filed by Mr. Napper.  
12 And Mr. Napper, specifically, is requesting the right to be  
13 present at any hearings relating to this motion. So these  
14 were filed on Wednesday -- no, Thursday and Friday of last  
15 week.

16 I guess I am looking for advice on when  
17 to set this, if you have any idea of what amount of time I  
18 might need for this. Any ideas from either side on that?

19 MS. CHAPMAN: Your Honor, we have some time  
20 with you tomorrow morning, and I think all we have is the 702  
21 motion.

22 THE COURT: And then tomorrow afternoon, I  
23 think, at 1:30 we had the Katie DeMocker subpoena issue.

24 MR. BUTNER: I don't know, you know, about  
25 Mr. Napper's availability, obviously. This is pretty short

1 notice.

2 THE COURT: If I can get him in, do you think  
3 tomorrow afternoon would be okay with you folks?

4 MR. BUTNER: Yes, I do.

5 MS. CHAPMAN: Tomorrow afternoon?

6 MR. SEARS: That is fine.

7 THE COURT: Probably after Katie's situation.

8 MS. CHAPMAN: Your Honor, Mr. Butner was also  
9 going to inquire of Sorensen at the break. I don't know if  
10 there is an update.

11 THE COURT: Any updates, Mr. Butner?

12 MR. BUTNER: Yes. I have inquired of  
13 Sorensen, if I could find it.

14 THE COURT: I believe we will be back  
15 upstairs.

16 MR. BUTNER: Judge, we have Mr. Napper's cell  
17 phone number, if you would like to try and reach him.

18 MR. PAUPORE: Which may not be on the  
19 pleading.

20 THE COURT: Don't put it in the record.

21 Well, as soon as we break, if I can call  
22 that from here, I will call it from here. So I will see if  
23 we can get him in here. I don't know if we need to have  
24 Ms. Gerard in here. But see if you can get her in here, if  
25 that is what they want.

1 Sorensen?

2 MR. BUTNER: I spoke with the forensic lab  
3 director during the lunch break. His name is Dan Helwig. He  
4 is the person that was referenced for the State's notice of  
5 additional testing, also. He indicated that -- and I am  
6 using terms that he provided to me -- that the materials had  
7 been extracted and amplified and begun preliminary analysis.  
8 There was rework to do on two or three samples, and those  
9 needed to be reinjected. They may need to do post  
10 amplification clean up. He is not certain at this point in  
11 time. And they are also in the process of running a known  
12 sample for Mr. Knapp in YSTR, and that is in the process of  
13 being amplified at the present time. That had never been  
14 done, apparently. And he believes that they will start  
15 analyzing these materials on Friday, unless there is more  
16 that needs to be reworked. And he believes that they -- if  
17 things goes as he expects them to go in the normal  
18 progression, that on or about the 14th -- the 12th or 13th of  
19 April they would be completed and we would be able to have a  
20 report on or about the 14th of April. And I would provide  
21 that as quickly as received.

22 THE COURT: Tuesday or Wednesday.

23 MR. BUTNER: To the defense.

24 MS. CHAPMAN: Your Honor, we would note that  
25 when it was filed and when we spoke with Mr. Helwig, he told

1 us it would take approximately two weeks from the date that  
2 they started their testing, which was approximately one week  
3 ago, and if he doesn't get it done until April 14, that is  
4 well beyond that date, and puts us a week --

5 MR. BUTNER: It actually isn't.

6 THE COURT: It is about two weeks.

7 MR. BUTNER: It is about two weeks or one more  
8 day, because they held up the start of the testing to make  
9 sure that the defense expert could get there, so they lost  
10 about a half a day as a result of that. So basically they  
11 are on track.

12 THE COURT: My bailiff has returned.

13 THE BAILIFF: She is checking. She is trying  
14 to find Mr. Napper.

15 THE COURT: Any notion as to what Judge Hess  
16 is doing so I can tell these fine folks which courtroom we  
17 are going to be using?

18 THE BAILIFF: They are still in our courtroom  
19 as of right now.

20 THE COURT: Judge Hess said come  
21 you-know-where or high water, he would have a jury selected  
22 today, so they would be back down. He is talking about going  
23 overtime.

24 THE BAILIFF: He was just down here about 20  
25 till and then went back up, so my guess is they are doing

1 strikes, but I don't know that.

2 THE COURT: I think we will be back upstairs  
3 for you folks. And we will go off record and recess this  
4 hearing, and I will see if we can call the number and get  
5 Mr. Napper on the phone here.

6 With regard for detention staff tomorrow,  
7 let's start up again at 9:00.

8 (Whereupon, a discussion was held off the record.)

9 (Whereupon, these proceedings were concluded.)

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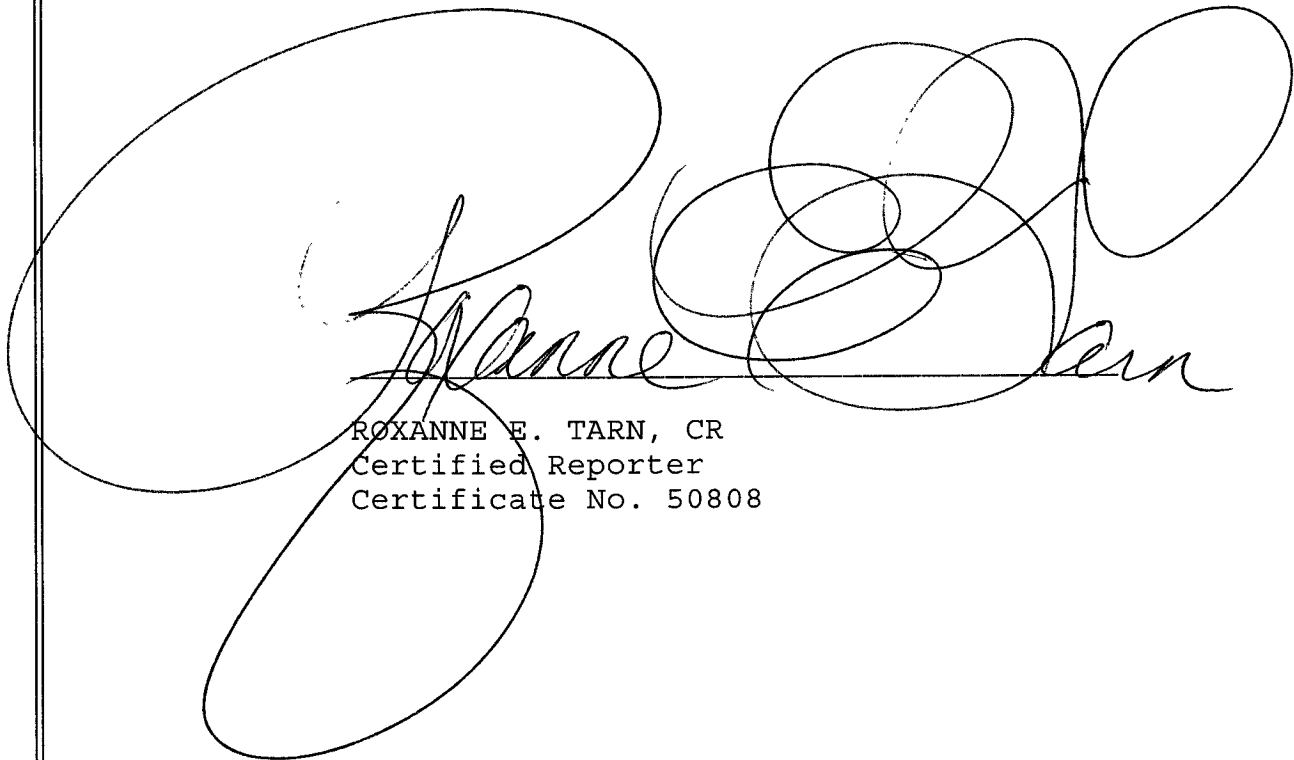
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C E R T I F I C A T E

I, ROXANNE E. TARN, CR, a Certified Reporter  
in the State of Arizona, do hereby certify that the foregoing  
pages 1 - 223 constitute a full, true, and accurate  
transcript of the proceedings had in the foregoing matter,  
all done to the best of my skill and ability.

SIGNED and dated this 10th day of May, 2010.



ROXANNE E. TARN, CR  
Certified Reporter  
Certificate No. 50808